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In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

ZAC A. CRITTENDEN, JR.,
d/b/a CRITTENDEN TRACTOR COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

MARION L. JETTON,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	2
Reasons for granting the petition	6
Conclusion	10
Appendix A	1a
Appendix B	37a
Appendix C	38a
Appendix D	39a

CITATIONS

Cases:

Aetna Insurance Co. v. *United States*, 456 F.2d 773	9
Chicago Title Insurance Co. v. *Sherred Village Associates*, 568 F.2d 217	8
H. B. Agsten & Sons, Inc. v. *Huntington Trust & Savings Bank*, 388 F.2d 156, certiorari denied, 390 U.S. 1025	9
Kimbell Foods, Inc. v. *Republic National Bank*, 557 F.2d 491, certiorari granted *sub nom. United States* v. *Kimbell Foods, Inc.*, No. 77-1359, May 15, 1978	6, 7, 9, 10
Portneuf-Marsh Valley Canal Co. v. *Brown*, 274 U.S. 630	8
Rankin v. *Scott*, 12 Wheat. 177	7

Cases—Continued

	Page
T. H. Rogers Lumber Co. v. *Apel*, 468 F.2d 14	8
United States v. *California-Oregon Plywood, Inc.*, 527 F.2d 687	9, 10
United States v. *California-Oregon Plywood, Inc.*, 527 F.2d 687	9, 10
United States v. *City of New Britain*, 347 U.S. 81	7
United States v. *General Douglas MacArthur Senior Village, Inc.*, 470 F.2d 675, certiorari denied *sub nom. County of Nassau* v. *United States*, 412 U.S. 922	8
United States v. *Latrobe Construction Co.*, 246 F.2d 357, certiorari denied, 355 U.S. 890	9
United States v. *Pioneer American Insurance Co.*, 374 U.S. 84	7-8
United States v. *Ringwood Iron Mines, Inc.*, 251 F.2d 145	9
Willow Creek Lumber Co., Inc. v. *Porter County Plumbing & Heating, Inc.*, C.A. 7, No. 77-1536, decided March 16, 1978	8

Statutes:

Consolidated Farmers Home Administration Act of 1961, 75 Stat. 307, as amended, redesignated as Consolidated Farm and Rural Development Act, 86 Stat. 657, 7 U.S.C. 1921 *et seq.*	2
7 U.S.C. 1922	2
Federal Tax Lien Act of 1966, 80 Stat. 1126, adding 26 U.S.C. 6323(b)(5)	6

Statutes—Continued

	Page
28 U.S.C. 1345	3

Miscellaneous:

Uniform Commercial Code, Section 9-310	5, 6

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-36a) is reported at 563 F.2d 678. The opinion of the district court (App. D, *infra*, pp. 40a-41a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 37a) was entered on November 21, 1977. A petition for rehearing was denied on February 6, 1978 (App. C, *infra*, p. 39a). On April 28, 1978, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to and including July 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a private lien that arises after a federal lien had attached may take precedence over the federal lien under principles giving the private lien a form of "super-priority."

STATEMENT

1. From 1970 to 1972 Ralph B. Bridges obtained a series of operating loans from the Farmers Home Administration (FHA) of the United States Department of Agriculture (App. A, *infra*, p. 3a). The loans were authorized by the Consolidated Farmers Home Administration Act of 1961,[1] 75 Stat. 307, as amended, 7 U.S.C. 1921 *et seq.*, under which farmers and ranchers who are "unable to obtain sufficient credit elsewhere to finance their actual needs at reasonable rates and terms" (7 U.S.C. 1922) may obtain federal assistance. On February 2, 1972, Bridges

[1] The Act has been redesignated the Consolidated Farm and Rural Development Act. See 86 Stat. 657.

executed the second of two security agreements relating to these loans, granting the FHA a security interest in his crops and farm equipment, including an Allis Chalmers diesel 21 tractor (App. A, *infra*, p. 3a). A financing statement, indicating the secured party as the United States acting through the Farmers Home Administration, was filed on February 2, 1972, in the appropriate county clerks' offices (*ibid.*).

More than nine months after the financing statement was filed, Bridges first took his tractor to respondent for repairs (App. A, *infra*, pp. 3a-4a). Bridges accumulated an unpaid repair bill of $1,607.47. On December 21, 1973, Bridges took his tractor to respondent for additional repairs, which raised his total outstanding bill to $2,151.28 (*id.* at 4a). Respondent retained possession of the tractor while awaiting payment (*ibid.*).

On February 4, 1974, Bridges filed a petition in bankruptcy in the United States District Court for the Middle District of Georgia. On March 14, 1974, respondent foreclosed on his repairman's lien, obtaining a writ executed by the county sheriff, and was permitted to remain in possession as bailee (App. A, *infra*, p. 4a). Bridges was discharged in bankruptcy on September 26, 1974 (*ibid.*).

2. On May 1, 1975, the United States began this action by filing a complaint against respondent to obtain possession of the tractor. See 28 U.S.C. 1345. The complaint alleged that Bridges had defaulted under the terms of his loan agreements and that the United States was entitled to immediate possession

of the tractor (which had an estimated value of $5,000) to meet Bridges' obligations under the FHA loans.

The district court granted respondent's motion for summary judgment (App. D, *infra*, pp. 40a-41a). It held that the government's security interest was not perfected because the financing statement did not adequately describe the collateral. It further held that, even if the collateral had been adequately described, the United States still would not have prevailed because respondent "had a special mechanic's lien against the property which has priority over the [government's] security interest" or, alternatively, had an "equitable lien * * * superior to any lien claimed by the [government] * * * [because] [t]o hold otherwise would result in the unjust enrichment of the [government] at the expense of [respondent]" (*id.* at 41a).

3. The court of appeals affirmed in part. It held that the financing statement's description of the collateral was adequate (App. A, *infra*, pp. 5a-12a), but it concluded that the government's lien, although first in time, is not entitled to full priority over respondent's lien (*id.* at 12a-36a).

The court of appeals stated that federal law determines the relative priority of federal liens (*id.* at 12a), but it declined to follow the established federal rule that the lien "first in time" is "first in right" (*id.* at 13a-25a). It justified its decision as "consistent with accepted commercial principles," which recognize that "[t]o allow a creditor to claim improved personal property at the expense of the repairman's interest * * * would grant the creditor an unfair windfall" (*id.* at 22a-24a), and it concluded that the FHA deserves no more protection than other lenders "where, as here, [it] was engaged in local moneylending transactions" (*id.* at 25a).

The court then fashioned what it thought would be an appropriate federal rule (*id.* at 25a-36a). It first considered whether to apply state law or the provisions of the model Uniform Commercial Code (U.C.C.) relating to priority of repair liens (*id.* at 25a-29a).[2] It observed that Georgia law is unclear but might well deny respondent's lien "super-priority" over the earlier federal lien (*id.* at 26a, 28a). The court ultimately concluded that, in the interest of uniformity, it would apply the model U.C.C. provisions as the federal rule (*id.* at 28a-29a).

Because Section 9-310 of the U.C.C. looks to state law to determine whether "a lien upon goods in the possession of [the repairman]" is created, the court of appeals next investigated whether Georgia law "recognizes a mechanic's lien for improvements made to personal property" (*id.* at 31a). After satisfying itself that respondent's lien is recognized (whether

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[2] Section 9-310 of the model U.C.C. provides:

> When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

or not accorded priority) under state law (*ibid.*),[3] the court turned to the remaining question "whether that portion of [respondent's] lien representing repairs made before his last possession of the tractor should be given priority over FHA's security interest" (*id.* at 32a-35a). Because "the [U.C.C.] case law is not instructive" on this point (*id.* at 33a), the court looked to the rule under the Federal Tax Lien Act of 1966, 80 Stat. 1126, adding 26 U.S.C. 6323 (b)(5) (see App. A, *infra*, p. 19a). That statute gives repairmen's liens priority over federal tax liens only if the repairman "is, and has been, continuously in possession of such property from the time such lien arose." The court determined that, under this test, respondent's lien is superior to the federal lien for the last $543.81 in repairs, and it accordingly remanded for further proceedings (*id.* at 33a-36a).

REASONS FOR GRANTING THE PETITION

This case, like *Kimbell Foods, Inc.* v. *Republic National Bank*, 557 F.2d 491 (C.A. 5), certiorari granted *sub nom. United States* v. *Kimbell Foods, Inc.*, No. 77-1359, May 15, 1978, involves the rules for determining priority between competing liens. In *Kimbell* the court of appeals decided that a private

[3] The court stated (App. A, *infra*, pp. 31a-32a n. 20), however, that it would *not* follow Section 9-310 insofar as it provides that the repairman's lien does not take priority where the repairman's lien is subordinated by statute to a specified security interest. The court of appeals apparently would override both state law and the model U.C.C. to accord superpriority to repairmen's liens.

lien may take precedence over the federal lien even though the private lien did not become "choate" before the federal lien was perfected.[4] The present case, like *Kimbell*, involves a question of "choteness." Because respondent's lien did not arise until after the federal lien had been perfected, it necessarily was not "choate" before the federal lien was perfected. If the Court should agree with our submission that *Kimbell* was wrongly decided, therefore, it would follow that the court of appeals' decision in the present case cannot stand.[5]

But the Court need not accept our arguments in *Kimbell* to conclude that the court of appeals' judgment in this case is incorrect. The court has gone a step beyond its earlier opinion in *Kimbell* and has rejected the well-established rule that the lien first in time is also first in right; it has declined to give priority to a federal lien that was unquestionably first in time. In so doing, it has discarded a "principle [that] is believed to be universal" (*Rankin* v. *Scott*, 12 Wheat. 177, 179), a principle that, this Court has held, should be applied "in the absence of legislation to the contrary" (*United States* v. *City of New Britain*, 347 U.S. 81, 85-86). See also, *e.g.*, *United States* v. *Pioneer American Insurance Co.*,

[4] We have furnished a copy of our petition in *Kimbell* to counsel for respondent.

[5] The court acknowledged (App. A, *infra*, pp. 13a-15a n. 11) that respondent's lien did not become "choate" ahead of the federal lien, and that its disposition of the case therefore necessarily rested on its rejection of the "choateness" doctrine.

374 U.S. 84, 87; *Portneuf-Marsh Valley Canal Co.* v. *Brown*, 274 U.S. 630, 636.

The court of appeals believed that the abolition of the first in time rule would enable repairmen to obtain greater security for payment due on account of repairs and would prevent "unjust enrichment" of the party with the major security interest in the repaired item. The court also "[saw] no reason why FHA's mortgage lien should prevail in situations in which Congress has decided that a tax lien should be inferior" (App. A, *infra*, p. 20a). The court's abandonment of the first in time rule conflicts, however, with decisions of at least six other courts of appeals.[6]

[6] The First, Second, Seventh and Tenth Circuits have reconsidered the choateness doctrine in light of the tax lien statute on which the court relied in the present case, and continue to apply the choateness doctrine, in conjunction with the "first in time" rule, to federal non-tax liens. See *Willow Creek Lumber Co., Inc.* v. *Porter County Plumbing & Heating, Inc.*, C.A. 7, No. 77-1536, decided March 16, 1978; *Chicago Title Insurance Co.* v. *Sherred Village Associates*, 568 F.2d 217 (C.A. 1); *United States* v. *General Douglas MacArthur Senior Village, Inc.*, 470 F.2d 675 (C.A. 2), certiorari denied *sub nom. County of Nassau* v. *United States*, 412 U.S. 922; *T. H. Rogers Lumber Co.* v. *Apel*, 468 F.2d 14 (C.A. 10). In *MacArthur Senior Village* the appellees unsuccessfully contended that the Second Circuit should apply super-priorities that were conferred by state law and recognized by the tax lien statute. The cases in the First, Seventh and Tenth Circuits involved mechanics' or materialmen's liens, and the primary issues were whether these liens were sufficiently perfected at the time the federal lien attached to prevail over the federal lien under the "first in time" rule.

In addition, the Third and Eighth Circuits, in cases antedating the tax lien amendments, have refused to recognize super-priorities and instead have applied the "first in time"

Our argument in *Kimbell* that it is necessary to resolve the conflict and to have a uniform federal rule to govern the priority of billions of dollars of federal loans and guarantees applies with equal force in the present case, and the Court therefore should grant review.

Most of the substantive arguments we have made in *Kimbell* pertain to the court of appeals' rejection of the "first in time" doctrine as well as to its earlier rejection of the "choateness" doctrine.[7] But it would be possible for the Court to disagree with our contentions concerning the "choateness" doctrine and for it to accept the argument, which we make here, that

rule. *United States* v. *Ringwood Iron Mines, Inc.*, 251 F.2d 145 (C.A. 3); *United States* v. *Latrobe Construction Co.*, 246 F.2d 357 (C.A. 8), certiorari denied, 355 U.S. 890.

Cf. *H. B. Agsten & Sons, Inc.* v. *Huntington Trust & Savings Bank*, 388 F.2d 156 (C.A. 4) (*en banc*), certiorari denied, 390 U.S. 1025; *Aetna Insurance Co.* v. *United States*, 456 F.2d 773 (Ct. Cl.), both of which reject the argument that the Tax Lien Act has any bearing on the priorities of federal non-tax liens.

But see *United States* v. *California-Oregon Plywood, Inc.*, 527 F.2d 687 (C.A. 9) (according super-priority to state tax liens).

[7] As we have argued in *Kimbell*, any attempt to develop new priority rules by litigation rather than by legislation produces substantial uncertainty in commercial dealings. The result in this case—which may have provided respondent with a priority over the federal government that respondent would have been denied, under Georgia law, against a competing private lienor (see App. A, *infra*, pp. 26a-28a)—came as a surprise to the United States and doubtless startled private parties as well. In order to reach its result, the court made a number of choices, each not predictable in advance. It (1) chose between state law and the U.C.C. in fashioning a general

the "first in time" principle should be retained in the absence of legislation calling for some different priority rule. Consideration of this case in tandem with *Kimbell* might illuminate the consequences of the possible combinations of priority rules, and it would permit the Court to consider private liens that have, under state law, both ordinary priority (as in *Kimbell*) and "super-priority" (as in the present case). We therefore believe that it should grant review in both cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

MARION L. JETTON,
Assistant to the Solicitor General.

MAY 1978.

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rule; (2) then followed the U.C.C. in looking to state law to see if a lien had been created (noting that in some circumstances it would follow neither the U.C.C. nor state law); and (3) finally considered both U.C.C. case law and the Federal Tax Lien Act of 1966 concerning the possession requirement before "divvying up the tractor at last" (*id.* at 30a). The Ninth Circuit, on the other hand, might well have reached a different result in this case, although it too has rejected the "first in time" rule, because that circuit appears to apply state law in determining priorities. See *United States* v. *California-Oregon Plywood, Inc., supra.*

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 75-4174

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ZAC A. CRITTENDEN, JR., d/b/a
Crittenden Tractor Company, DEFENDANT-APPELLEE

Nov. 21, 1977

Before GOLDBERG and TJOFLAT, Circuit Judges, and WYATT *, District Judge.

GOLDBERG, Circuit Judge:

Today we examine the lineage of liens to determine their heirarchy. At issue is the relative priority of the Farmers Home Administration's (FHA) perfected security interest in a tractor and Zac A. Crittenden, Jr.'s mechanic's lien against the same tractor. The case presents a number of distinct issues, ranging from mundane commercial questions to intricate matters of federal common law. Specifically, we must decide (1) whether FHA's security interest was adequately perfected and whether this determination is governed by federal or state law; (2) whether the relative priority of the competing interests in the tractor at issue shall be determined under federal or state law; (3) if federal law applies, whether the

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* Senior United States District Judge, Southern District of New York, sitting by designation.

applicable federal rule is the first in time, first in right rule, a federal common law rule guided by Uniform Commercial Code (U.C.C.) principles, or a federally incorporated state commercial law rule; and finally, (4) under the applicable rule, whether Crittenden's mechanic's lien is superior to FHA's security interest and if so, whether the lien's superiority extends to the tractor's entire repair bill or is limited to that portion of the bill representing repairs made during Crittenden's last and continuing possession of the tractor.

The district court sustained Crittenden's motion for summary judgment on the independent grounds that FHA had failed to perfect its security interest, that Crittenden's mechanic's lien had priority over the security interest under both federal and Georgia law, and that Crittenden was entitled to assert an equitable lien on the property superior to FHA's security interest. We hold (1) that the issue of the perfection of FHA's security interest must be decided with reference to federal law and that the government's security interest was adequately perfected; (2) that federal law governs the priority determination; (3) that the applicable federal standard is a federal commercial law rule guided by U.C.C. principles; and (4) that under this rule, Crittenden's mechanic's lien is superior to FHA's perfected security interest, but only to the extent of repairs made during his last and continuing possession of the tractor.[1]

[1] Crittenden also asserts an equitable lien on the tractor superior to FHA's security interest. In light of our resolution of the mechanic's lien issue, it is unnecessary to decide this question. Our reasons for limiting mechanic's lien superiority to repairs made during Crittenden's last possession of the tractor also are applicable in the equitable lien context. Thus even if an equitable lien did exist, its superiority to FHA's security interest would be identical to that of the mechanic's lien.

I.

Disputes over the priority of liens inevitably arise when a borrower is unable to pay his debts as they become due and lacks sufficient collateral to satisfy his creditors. Here the impecunious one was Ralph B. Bridges of Terrell County, Georgia. From 1970 to 1972 Bridges, in need of operating capital for his farm, obtained several loans pursuant to the Consolidated Farmers Home Administration Act of 1961, 7 U.S.C. § 1921 *et seq.*,[2] from FHA, an agency of the United States Department of Agriculture. On February 2, 1972 Bridges executed a security agreement granting FHA a security interest in his crops and certain farm equipment, including an Allis Chalmers diesel 21 tractor. A financing statement, consisting of a standard FHA form,[3] was filed in the offices of the Clerks of Superior Court for Terrell County and for Randolph County on February 2, 1972.

On December 29, 1972 Bridges first took his Allis Chalmers tractor to Crittenden's place of business in

[2] The Act is now entitled the "Consolidated Farm and Rural Development Act," 7 U.S.C. § 1921 *et seq.*

[3] Form FHA 440-25 (Rev. 5-25-66).

Shellman, Georgia (Randolph County) for repairs. Between that date and December 21, 1973, Bridges brought his tractor to Crittenden for repairs some six times, accumulating an unpaid repair bill of $1607.47. On December 21, 1973 Bridges again took his tractor to Crittenden for repairs. The bill came to $543.81, raising the total outstanding debt to $2151.28. Because Bridges was unable to pay this bill, Crittenden retained possession of the tractor. On February 4, 1974, Bridges filed a petition in bankruptcy with the United States District Court, and on March 14, 1974 Crittenden successfully levied on the tractor[4] and was allowed to remain in possession as bailee.

Subsequent to Bridges' discharge in bankruptcy on September 26, 1974, the unpaid balance on the loans due FHA was $7,251.22, and the tractor was valued at $5,000. After Crittenden refused to turn over the tractor to FHA, the United States, plaintiff-appellant, filed this suit against Zac Crittenden, defendant-appellee, to obtain possession of the tractor. The district court granted defendant's motion for summary judgment and plaintiff now appeals.

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[4] Based on Crittenden's affidavit, the Randolph County Superior Court clerk issued a fi. fa., a special Georgia writ of foreclosure, against the tractor and the county sheriff levied the fi. fa. on the tractor. Fortunately, we need not decide whether FHA could have attacked Crittenden's fi. fa. with a fo fum or whether the result would be different if Crittenden had English blood.

II. The Financing Statement

The relevant pre-printed portion of the financing statement states:

> 1. This financing statement covers the following types or items of collateral, including proceeds and products thereof:
>
> (a) Crops, livestock, supplies, other farm products, farm equipment and inventory.
>
> (b)

The appellee maintains that FHA does not have a perfected security interest in the tractor because the tractor was not sufficiently described in the financing statement to meet the requirements for perfection under Georgia law. We disagree with appellee and the district court and hold that federal law rather than state law governs the determination of the sufficiency of a financing statement filed by FHA. We further hold that in this case the description found in the financing statement was sufficient to perfect a security interest in Bridges' tractor.

A. *Choice of Law*

In *United States* v. *Hext*, 444 F.2d 804 (5th Cir. 1971) we joined the Third, Sixth, Ninth, and Tenth Circuits in holding that the rights and liabilities of the parties to a suit arising from FHA loan transactions must, under the rationale of the *Clearfield Trust* doctrine,[5] be determined with reference to federal

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[5] *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943).

law.[6] Just as a supremacy clause reigns in constitutional terms, in the choice of law context the doctrine of supremacy must obtain in lien law where the government is the lender. In *Hext*, FHA had perfected a security interest in the debtor's cotton crop. The debtor later sold the cotton to a cotton broker who the parties agreed was a bona fide purchaser in good faith with no actual knowledge of FHA's security interest. The debtor then went bankrupt. In a conversion suit brought by FHA against the broker and a warehouse company that stored the cotton, the district court held the defendants liable for the government's loss under state law. We reversed, holding that federal common law, to be fashioned according to general principles of commercial law, must govern the rights and liabilities of the United States in suits arising from FHA loan transactions.

While it is unnecessary to detail fully the reasoning of our decision in *Hext*, it is instructive to note that

> the principal reason supporting the application of federal law is the need for a uniform rule of decision to govern the rights of the United States in the administration of a large-scale program,

[6] See *Cassidy Commission Co.* v. *United States*, 387 F.2d 875 (10th Cir. 1967); *United States* v. *Carson*, 372 F.2d 429 (6th Cir. 1967); *United States* v. *Sommerville*, 324 F.2d 712 (3rd Cir. 1963), *cert. denied*, 376 U.S. 909, 84 S.Ct. 663, 11 L.Ed.2d 608 (1964); *United States* v. *Matthews*, 244 F.2d 626 (9th Cir. 1957). The Eighth and Fourth Circuits have held that state law controls. *See United States* v. *Union Livestock Sales Co.*, 298 F.2d 755 (4th Cir. 1962); *United States* v. *Kramel*, 234 F.2d 577 (8th Cir. 1956).

> of nation-wide scope such as the FHA farm loan program, rather than subjecting "federal rights and duties to the exceptional uncertainty and heterogeneity" which might result "if disparate laws of individual states were applied to substantially identical loan transactions."

444 F.2d at 808, *quoting United States* v. *Sommerville*, 324 F.2d 712, 716, 717 (3rd Cir. 1963) (footnote omitted). We also stressed the undesirability of subjecting FHA to the possibility that the governing state law might be changed whenever the United States was successful in litigation. *Id.*, at 809.[7]

B. *Determining the Applicable Federal Rule*

Having concluded that federal law must determine whether FHA's financing statement is adequate to perfect its security interest, we now must decide whether to fashion a uniform federal rule or to incorporate the relevant state law rule. *Hext* admonishes us that in general this court should be guided by principles set forth in the Uniform Commercial Code when fashioning the federal common law rule applicable to suits arising from FHA loan transactions. Because the applicable U.C.C. sections for de-

[7] After the district court ruled for the government in *Hext*, the Texas legislature amended the applicable state law. Tex. Rev.Civ.Stats. Ann. art. 5571 (Vernon Supp. 1969). We noted on appeal that the new statute was contrary both to the general common law of conversion and to Uniform Commercial Code principles. If the *Hext* court had concluded that state law was applicable, subsequent FHA transactions would have been governed by that statute.

termining the sufficiency of a financing statement have been adopted by the Georgia Legislature, Ga. Code Ann. §§ 109A-9-402, 109A-9-110, it might appear that the law governing this issue would be the same whether we adopted a uniform federal rule or incorporated state law. However, judicial interpretations of the U.C.C. rules do differ from state to state, and adoption of state law by incorporation consequently would lead to variant results depending on the applicable state law. On the other hand, adoption of a single federal rule would lead to uniform results in determining the sufficiency of FHA's financing statement regardless of the law in the state whose law would otherwise be applied. For the reasons discussed below, we conclude that the proper federal rule is a uniform common law rule based on U.C.C. sections 9-402 and 9-110.

The need for a uniform federal rule to govern the sufficiency determination is apparent from the facts of the instant case. The financing statement at issue consists of a pre-printed FHA form which lists the most common types of collateral used to secure FHA loans. FHA uses this form to secure loans throughout the country. As we shall see, the only issue with respect to these forms is whether the pre-printed description of the collateral is sufficient to put third parties on notice of possible security interests. As a factual matter, it is presumably the case that a standard form sufficiently descriptive to put a potential creditor in Texas on notice of a security interest in a tractor is also sufficient to put a creditor in Georgia

or anywhere else on equal notice. Nonetheless, state courts might differ as to the specificity required to perfect a security interest in a tractor.

The federal interest in uniformity recognized in *Hext* is particularly compelling in this situation. Use of a single standardized financing statement greatly simplifies the administration of FHA's nationwide program. Furthermore, we have not discovered a single state court case in which the precise issue of whether the term "farm equipment" is sufficient to perfect a security interest in a tractor was decided. Because state law on this issue is at best uncertain and vague, FHA's ability to administer its loan program would be furthered greatly by a single and final determination, rather than the possibility of fifty-two separate determinations, of the issue.

The corresponding state interest in having its own law apply here is not great. Although the legal resolution of the sufficiency question might vary from state to state, the correct conclusion to the underlying factual question, whether the FHA financing statement gives sufficient notice to third parties of FHA's security interest in the tractor, should not vary. A single federal determination of this question is therefore sufficient to protect fully the state interest in adequate notice.[8]

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[8] In *Hext, supra,* we stated in dictum that

> Although . . . federal law must govern the ultimate questions of the duties and liabilities of the parties in the instant litigation, the *filing* requirements for perfection of a security interest must nevertheless be those in effect

C. *Application of the U.C.C. Rule*

The requirements of a financing statement are spelled out in U.C.C. § 9-402. In pertinent part, that section states:

> A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and *contains a statement indicating the types, or describing the items, of collateral.* (Emphasis Supplied)

Section 9-110 of the Code further provides:

> For the purposes of this Article any description of personal property or real estate is sufficient

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in the particular state where the collateral is located. *See United States* v. *Sommerville*, 324 F.2d 712, 717 (3rd Cir. 1963).

444 F.2d at 806 n.2 (emphasis supplied). We understand this statement to refer to the formal requirements for *filing* a financing statement, such as the proper place of filing, under U.C.C. §§ 9-401 to 9-403, and not to the sufficiency of the financing statement under U.C.C. § 9-402. *See United States* v. *Sommerville*, 324 F.2d 712 (3rd Cir. 1963). This statement is consistent with our approach here because the state does have a significant interest in ensuring that its place of filing, filing fee, signature, and address requirements are met. While this interest requires us to leave the wherefores and whereas's to the states, the whys must be left to the federal government for the reason that, at least in this case, the interest of the federal government in seeing that its liens have universal application outweighs the corresponding state interest in having its own law apply. The muniments to constitute a lien can be Georgia-based, but the effects of the muniments here are federally determined.

> whether or not it is specific *if it reasonably identifies* what is described. (Emphasis Supplied)

The official comment to U.C.C. § 9-402 explains that the Code has adopted a system of "notice filing." The filed notice is sufficient if it indicates that the secured party may have a security interest in the collateral described and that further inquiry by the interested party is warranted. The official comment to U.C.C. § 9-110 states that the Code does not contemplate exact and detailed descriptions. Merely indicating the *types* of collateral is sufficient. *See* J. Honnold, Law of Sales & Sales Financing 495 (University Casebook Series 1976). While some descriptions may be so broad that they are as unhelpful as no description at all, *see In re Fuqua*, 461 F.2d 1186 (10th Cir. 1972) (description "all personal property" too broad to perfect security interest in certain likestock, feed, and milking equipment), very broad descriptions generally are allowed if the description is sufficient to indicate to interested third parties the possible existence of prior encumbrances on the collateral. *See, e.g., In re Munger*, 495 F.2d 511 (9th Cir. 1974) ("all crops . . . [and their] proceeds" sufficient to describe federal farm subsidy payments); *In re Turnage*, 493 F.2d 505 (5th Cir. 1974); *United States* v. *First National Bank*, 470 F.2d 944, (8th Cir. 1973).

In the instant case, we think that any reasonable third party who considered accepting as collateral the Allis Chalmers tractor would receive ample notice from FHA's financing statement that further inquiry

was in order. The term "farm equipment" contained in the financing statement constitutes a sufficiently specific description of the tractor to perfect FHA's security interest.[9]

III. Priority of Competing Claims to the Tractor

A. *Choice of Law*

It is evident from our discussion of the *Hext* case, *supra*, that federal law must govern the rights and liabilities of parties to disputes arising from FHA loan transactions. We are thus in agreement with the parties that federal law must determine the priority of the competing claims to Bridges' tractor in this case.

B. *The Appropriate Federal Rule*

We are called upon here to referee a feud among the family of federalism over the priority of liens and must determine the pater familias recognizing that siblings have their say and that rules of primogeniture have no strict applicability. In this process we can freely adopt or adapt the decision to the exigencies of federal and state law in tandem, in controvention, and in cooperation. Determining the appropriate federal rule is a nettlesome problem, and

[9] Appellee also argues that use of a pre-printed form with a printed statement describing the types of collateral at issue is both confusing and misleading because the only typewritten entry pertains to crops. We reject this contention. Our careful examination of the financing statement convinces us that a reasonable person reading the document would be neither confused nor mislead into believing that FHA's security interest was limited to crops.

while we should recognize and advance federal interests, we must be careful lest the federal government be meddlesome when it is not necessary and essential. The three candidates for the position are (1) the federal common law rule of "first in time, first in right," (2) a federal rule based on Uniform Commercial Code principles, and (3) a federal rule incorporating state law. To this central issue of the case, we now turn.

1. "First in time, first in right" is not always right.

FHA contends that its security interest is superior to Crittenden's mechanic's lien[10] because the mechanic's lien was inchoate, that is, not specific and certain, at the time that FHA's security interest attached. The Supreme Court has held that under the rule of "first in time is the first in right" a federal tax lien is superior to all other liens not choate at the time the federal tax lien is filed.[11] *United States* v.

[10] The term "mechanic's lien" is often used to refer to both the artisan-repairman's lien at issue here and the materialman—subcontractor's lien. These two types of mechanic's liens sometimes are treated quite differently under state and federal law; *compare* the following Federal Tax Lien Act provisions: 26 U.S.C. § 6323(b)(5) *with* § 6325(b)(7). Our use of the term "mechanic's lien" refers only to the so-called artisan or repairman's lien for improvements or repairs on personal property.

[11] For a lien to be "choate" the identity of the lienor and the property subject to the lien, and the amount of the lien, must be specific, certain, and complete. This usually requires either that the lien has been reduced to a judgment or that the

Equitable Life Assurance Society, 384 U.S. 323, 327, 86 S.Ct. 1561, 1564, 16 L.Ed.2d 593 (1966); *United States* v. *Pioneer American Insurance Co.*, 374 U.S.

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lien is enforceable by summary proceedings. *See United States* v. *Pioneer American Ins. Co.*, 374 U.S. 84, 83 S.Ct. 1651, 10 L.Ed.2d 770 (1963); *United States* v. *New Britain*, 347 U.S. 81, 74 S.Ct. 367, 98 L.Ed. 520 (1954). Specification of the lienor's prep school affiliation, however, is unnecessary. Although the first in time, first in right rule usually is treated in tandem with the choateness doctrine, *see Connecticut Mutual Life Ins. Co.* v. *Carter*, 446 F.2d 136 (5th Cir.), *cert. denied*, 404 U.S. 857, 92 S.Ct. 104, 30 L.Ed.2d 98 (1971) as a technical matter it is a separate doctrine, *see Kimbell Foods, Inc.* v. *Republic Nat. Bank*, 557 F.2d 491, 502 (5th Cir. 1977). For example, consider a private lien that arose before a federal tax lien came into existence. The private lien would be chronologically first in time. If that lien, however, was one not reduced to a judgment until after the tax lien came into existence, it might not be choate. Under a first in time rule incorporating the choateness doctrine, the tax lien would be superior to the private lien because it would have arisen before the private lien became choate, and consequently would be first in time. If, however, the first in time rule were applied without the choateness doctrine, this result would change and the private lien would prevail because it would have arisen before the tax lien came into existence. *See* note 13 *infra*.

In the instant case, however, application of the first in time rule without the choateness doctrine would not vary the result. It is undisputed that Crittenden's lien was inchoate when the FHA's security interest was perfected on February 2, 1972; at that time the mechanic's lien was not even in existence. Thus if the choateness doctrine applies here, FHA's security interest would be superior to Crittenden's lien. Even under the choateness doctrine, a security interest is presently existent from the time of its recordation. Furthermore, even if the choateness doctrine were rejected, FHA's lien, which was perfected before the mechanic's lien came into existence, would still be first in time. Thus Crittenden's mechanic's lien

84, 83 S.Ct. 1651, 10 L.Ed.2d 770 (1963); *United States* v. *New Britain*, 347 U.S. 81, 74 S.Ct. 367, 98 L.Ed. 520 (1954). *See generally* Kennedy, *From Spokane County to Vermont: The Campaign of the Federal Government Against the Inchoate Lien*, 50 Iowa L.Rev. 724 (1965); Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 Yale L.J. 905 (1954). Choateness is a doctrine of presagement. The natality of a lien can come subsequent to its conception, and the lien is inchoate while it is in the gestational stage. The first in time rule and the choateness doctrine are entirely court-made, *see* Plumb, *Federal Tax Liens and Priorities—Agenda for the Next Decade*, 77 Yale L.J. 228, 229-30 (1967), and have been extended to give federally held mortgages priority over certain unrecorded liens that would have been superior under state law. *United States* v. *Roessling*, 280 F.2d 933 (5th Cir. 1960) (FHA mortgage lien superior to county tax lien). *See United States* v. *Oswald & Hess Co.*, 345 F.2d 886 (3rd Cir. 1965) (SBA mortgage lien).

The three Supreme Court cases which developed the first in time test in the federal tax lien context were all decided prior to the passage of the Federal Tax Lien Act of 1966. 26 U.S.C. § 6323. The Act was passed to mitigate the often harsh results of the much criticized first in time rule and choateness doc-

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could not be superior to FHA's perfected security interest unless both the choateness doctrine and the first in time rule were rejected.

trine, *see* Kennedy, *supra*, 50 Iowa L.Rev. at 750-754; Plumb, *supra*, 77 Yale L.J. at 229-33, 285-96 (1967), and it substantially altered the common law priority rules for federal tax liens. We acknowledged Congress' disapproval of the choateness doctrine in *Connecticut Mutual Life Insurance Co.* v. *Carter*, 446 F.2d 136 (5th Cir.), *cert. denied*, 404 U.S. 857, 92 S.Ct. 104, 30 L.Ed.2d 98 (1971), which held that in light of the Tax Lien Act, the choateness doctrine would not be applied to determine the relative priority of a lien for attorney's fees contained in a first mortgage on farm property and a second mortgage lien held by FHA. In *Connecticut Mutual* an insurance company held a mortgage on farm property which contained a standard provision for payment of attorney's fees in case of default. FHA, with full knowledge of the prior mortgage and its attorney's fee provision, then perfected a second mortgage on the same property. When the debtor defaulted, FHA argued that its second mortgage was superior to the lien for attorney's fees because the latter lien was inchoate when FHA's mortgage attached. In rejecting this argument, we relied on a section of the Tax Lien Act which provided that a lien for attorney's fees, if valid under local law, would no longer be subordinate to a subsequently-filed federal tax lien. 26 U.S.C. § 6323(b)(8).[12]

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[12] In pertinent part, 26 U.S.C. § 6323 provides:

> (b) Even though notice of a lien imposed by section 6321 [federal tax lien] has been filed, such lien shall not be valid—

While recognizing that the Tax Lien Act did not of itself affect the priority of the competing claims in the case, we concluded that

> the statute diminishes the validity of the choate lien test in the important field of taxation where the doctrine originated. It would indeed be anomalous and contrary to our view of congressional intent to allow the FHA operating as a money-lending agency to prevail in a situation where the government as holder of a tax lien would have an inferior security interest. . . . The collection of taxes is certainly more vital to the government's existence than the making of farm loans and if Congress determines (as it has) that a federal tax lien, involuntarily imposed upon the government, is not unduly threatened by an inchoate lien for attorneys' fees, then we see no reason to exempt a federal mortgage lien, which the government sought to obtain, from the operation of a provision for attorneys' fees in a first mortgage.

446 F.2d at 139 (citations omitted). *See Kimbell Foods, Inc.* v. *Republic National Bank*, 557 F.2d 491 (5th Cir. 1977); *Ault* v. *Harris*, 317 F.Supp. 373 (D. Alaska 1968), *aff'd and opinion adopted sub nom. Ault* v. *United States*, 432 F.2d 441 (9th Cir. 1970). *See also United States* v. *California-Oregon Plywood, Inc.*, 527 F.2d 687 (9th Cir. 1975); *Hayden* v. *Prevatte*, 327 F.Supp. 635 (D.S.C. 1971); Comment,

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> (8) Attorneys' liens—With respect to a judgment . . . as against an attorney who, under local law, holds a lien upon . . . such judgment. . . .

The Priority of Federal Claims: Selected Problems and Theorical Considerations, 24 Case W.Res.L.Rev. 521, 534-35 (1973).[13]

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[13] In *Kimbell Foods, Inc.* v. *Republic Nat. Bank*, 557 F.2d 491 (5th Cir. 1977) we recently reaffirmed *Connecticut Mutual's* rejection of the choateness test. Kimbell had perfected a security interest in the debtor's property to secure present and future indebtedness resulting from the debtor's inventory purchases from Kimbell on credit. The Small Business Administration later guaranteed a Republic National Bank loan to the debtor and subsequently was assigned 90% of the Bank's note and its corresponding rights under the financing statement. The dispute centered on the relative priority of Kimbell and SBA's liens on the debtor's property. Although Kimbell's security interest was perfected first, its lien securing future indebtedness may not have been "choate" at the time SBA's interest arose. The court followed *Connecticut Mutual* in rejecting the choateness test and held Kimbell's lien superior.

The court's analysis, however, differed somewhat from that employed in *Connecticut Mutual*. In *Kimbell* we drew a distinction between the federal first in time, first in right priority scheme and the choateness doctrine, which determined the time at which the competing state claim was sufficiently certain to be compared chronologically with the federal claim in determining which was first in time. Because Kimbell's interest was perfected under the U.C.C. prior to the perfection of SBA's lien, our rejection of the choateness doctrine made Kimbell's lien "first in time." In those circumstances we held that Kimbell's lien took priority without questioning the validity of the first in time priority scheme. In fact, we carefully left open the application of the first in time rule in the context of special priority liens such as mechanic's liens. *Kimbell Foods, supra*, 557 F.2d at 503 n. 15.

In *Connecticut Mutual* we were faced with the same fact pattern as in *Kimbell*. The attorney's fee provision in Connecticut Mutual's security interest was also perfected before the federal lien was filed, and like the lien securing future indebtedness in *Kimbell*, it was probably inchoate at the time the government's security interest was filed. Nevertheless, the court in *Connecticut Mutual* did not distinguish between the

The instant case falls squarely within the *Connecticut Mutual* ratonale. A companion section in the Tax Lien Act to that relied on in *Connecticut Mutual* provides that

> (b) Even though notice of a lien imposed by Section 6321 [federal tax lien] has been filed; such lien shall not be valid—
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> (5)—[w]ith respect to tangible personal property subject to a lien under local law securing the reasonable price of the repair or improvement of such property, as against a holder of such a lien, if such holder is, and has been, continuously in possession of such property from the time such lien arose.

26 U.S.C. § 6323(b)(5).

This quoted provision of the Act rejects the first in time rule in determining the relative priority of a

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first in time rule and the choateness doctrine. After rejecting the choateness doctrine, the court assumed that the first in time test also was inapplicable and held that the FHA was subject to the same local law rules that governed the security interests of all other lenders. *Connecticut Mutual, supra*, 446 F.2d at 139. But as in Kimbell, the *Connecticut Mutual* court could have reached the same result by applying the first in time rule, since the private lien for attorney's fees was perfected before FHA's mortgage was filed.

This case, on the other hand, forces us to address the first in time rule directly. Because FHA perfected its security interest before Crittenden's lien arose, its lien would be "first in time" even if the choateness doctrine did not apply. For the reasons discussed in this section of our opinion, we have chosen to follow the *Connecticut Mutual* rationale and reject the first in time rule in determining priority between an FHA security interest and a mechanic's lien.

federal tax lien and a mechanic's lien and would clearly apply to Crittenden's lien if the government held a tax lien. For the same reasons expressed in *Connecticut Mutual*, we see no reason why FHA's mortgage lien should prevail in situations in which Congress has decided that a tax lien should be inferior.

Appellant appears to recognize that *Connecticut Mutual* controls the case at bar and, rather than try to distinguish that case, argues that *Connecticut Mutual* should be limited to its facts.[14] In support of this position, appellant cites decisions of the Second, Fourth, and Tenth Circuits that considered the same issue and concluded that the first in time, first in

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[14] Appellant argues that our decision in *Texas Oil & Gas Corp.* v. *United States*, 466 F.2d 1040 (5th Cir. 1972), limits *Connecticut Mutual* to its facts and reaffirms the validity of the choateness doctrine. We disagree. *See Kimbell Foods, supra*, 557 F.2d at 501 n.12. *Texas Oil* involved a private lien that was inferior to a federal tax lien under the provisions of the Federal Tax Lien Act itself. That Act recognized the priority of certain state interests, essentially granting exceptions to both the choateness doctrine and the first in time rule. Because the Act did not remove the particular state lien at issue in *Texas Oil* from the operation of the choateness doctrine, we found for the government on the basis of that doctrine. *Texas Oil* is not relevant to the case at bar; it merely stands for the obvious proposition that if the Tax Lien Act does not grant priority to a private lien over a tax lien, the tax lien is superior, and to that extent the choateness doctrine is still applicable. But in *Connecticut Mutual* and the case at bar, it is clear that the private liens at issue would be superior to a tax lien under the Tax Lien Act. We are faced with a situation in which, at least for tax liens, the Act abolishes both the choateness doctrine and the first in time rule.

right rule applied. *See United States* v. *General Douglas MacArthur Senior Village, Inc.*, 470 F.2d 675 (2nd Cir. 1972), *cert. denied*, 412 U.S. 922, 93 S.Ct. 2732, 37 L.Ed.2d 149 (1973); *T. H. Rogers Lumber Co.* v. *Apel*, 468 F.2d 14 (10th Cir. 1972); *Aetna Insurance Co.* v. *United States*, 456 F.2d 773, 197 Ct.Cl. 713 (1972); *H. B. Agsten & Sons, Inc.* v. *Huntington Trust and Savings Bank*, 388 F.2d 156 (4th Cir. 1967). These courts reasoned that Congress did not intend the Tax Lien Act to apply to non-tax liens and that it is up to Congress to extend the policies of the Tax Lien Act to other areas.

This use of Congressional intent is misconceived. Even if the Federal Tax Lien Act does not determine the parties' rights here, it can be said that that law has a consanguinity with our problem, even though our problem is not decided statutorily as a descendant of the Act. In the creativity of law we are not forbidden, in fact we are encouraged, to look to statutes in the area of discussion in order to flesh out congressional attitude and philosophy which, whenever possible, should cohere with the evolving federal common law. The opinion in *Connecticut Mutual* recognized that the Tax Lien Act does not itself change the priority of competing claims in an FHA case. At the same time, we concluded that the Act, by rejecting the Supreme Court's test in the tax lien area, eliminated the jurisprudential underpinnings of the lower courts' attempts to apply the choateness doctrine to other areas. The same is true of the first in time rule. We adhere to our position in *Connecticut Mu-*

tual and reject the application of the first in time, first in right rule in the case at bar.

We note that our approach here is consistent with accepted commercial principles. Possession is not an alien concept to commercial lien law, and the improver of property has not been a pariah among competing lienholders. For example, Uniform Commercial Code § 9-310 provides that

> When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

The stated purpose of this section, which has been adopted by the vast majority of states, is "to provide that liens securing claims arising from work intended to enhance or preserve the value of the collateral take priority over an earlier security interest even though perfected." U.C.C. § 9-310, Comment 1.

The prior secured creditor's interests are not prejudiced by granting the mechanic's lien superpriority status because the value of the secured party's collateral is usually enhanced by at least the amount of the lien.[15] The debtor can be expected not to incur

[15] It is possible that the mechanic's efforts occasionally will not increase the value of the collateral by the amount of the lien. *See* J. Honnold, *supra* at 667-68. To help protect the

expenses greater than the benefit conferred upon him. Thus in the case at bar FHA should be in the same position after Crittenden's lien attached as it was prior to Crittenden's labors. To allow a creditor to claim improved personal property at the expense of the repairman's interest in such a situation would grant the creditor an unfair windfall. See II G. Gilmore, Security Interests in Personal Property 878 (1965).

From the mechanic's viewpoint, the principle of just compensation supports superpriority for mechanic's liens. Congress in the Tax Lien Act recognized the equities of the mechanic's position. As we commented when construing § 6323(b)(5) of the Act in *Citizens Co-op Gin* v. *United States*, 427 F.2d 692, 698 (5th Cir. 1970):

> The statute was designed to protect the small businessman who operates informally, depending upon an oral agreement and his possession to enforce his claim for a reasonable fee for services which rendered the property more valuable. . . . The person involved, because of the informality of the transaction and well established custom, is unlikely to check the tax notices or obtain a written security agreement, but he does by cus-

secured party from unfair loss, U.C.C. § 9-310 has been interpreted to deny mechanic's lien priority for any part of the mechanic's charges that are unreasonable. *See e.g., Mousel* v. *Daringer*, 190 Neb. 77, 206 N.W.2d 579 (1973). *See also* II G. Gilmore, Security Interests in Personal Property 887-89 (1965). Federal Tax Lien Act § 6323(b)(5) also adopts this approach, granting priority only for "the reasonable price of the repair."

> tom retain control of the property until he is paid. When such a transaction—whether it be the repair of an automobile or the harvesting and ginning of cotton—increases the value of the property, we think Congress intended that the workers' security be protected against the federal tax lien. To hold otherwise would create injustice and hardship, a result contrary to the remedial purposes of the statute.

Almost every state has recognized the justice of granting mechanic's liens priority over perfected security interests.[16] Congress has acknowledged the equities of the mechanic's position in the Tax Lien Act. Yet appellant offers no justification for the first in time, first in right rule other than the rather feeble argument that the government's interest in collateral that secures its loans to the public is automatically superior, merely because the government is involved,

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[16] Appellant's own brief quotes with approval the following passage from the district court opinion in *J. S. Purcell Lumber Corp.* v. *Henson*, 405 F.Supp. 1130, (E.D. Va. 1975). The district court judge felt constrained by the Fourth Circuit's prior pronouncement in *H. B. Agsten & Sons, supra,* from adopting the *Connecticut Mutual* approach:

> Though right, equity, good sense, and good commercial practice seem to dictate the contrary, it is clear, as Judge Sobeloff notes, that Congress has not changed the priority rule except in the case of tax liens. Therefore, this Court must hold that the United States' lien secured by its deed of trust has priority over the mechanics lien asserted by Purcell.

It is reassuring to know that even appellant does not disagree that "right, equity, good sense, and good commercial practice" support our position.

to the interest of all third parties in the same collateral. We see no reason for assuming that FHA has a greater interest in the recovery of its loans than does any other lender. That there is a federal interest in protecting the federal fisc does not mean that we must fashion a rule under which the government always wins. We recognize that lienable lending by our federal government in recent years is not pygmoid, but this federal interest still should not be controlling where, as here, FHA was engaged in local moneylending transactions. *See Ault* v. *Harris, supra,* 317 F.Supp. at 374-75. FHA's more genuine interest in fair treatment under the controlling commercial practices is adequately protected by federal court jurisdiction and choice of law power in the resolution of disputes involving FHA.

We therefore choose not to give primacy to the doctrine of first in time, first in right. In evolving the law of liens we meet many complex problems which are not solvable by apothegmatic conclusions or maxims of easy verbalization, but which challenge profound analysis.

2. The Applicable Federal Rule

Having rejected the first in time, first in right rule, we must now choose between an autonomous federal rule modeled upon Uniform Commercial Code principles and a federal rule incorporating the local state law. In transactions arising in the vast majority of states, this issue would be relatively unimportant because most states have adopted the model version of

U.C.C. § 9-310, quoted above, which grants superpriority to certain mechanic's liens. In Georgia, however, such superpriority may not exist. Ga.Code Ann. § 109A-9-310.[17] Because the instant transaction would be governed by Georgia law if state law were applied, this issue is pivotal here.

The argument for applying state law in this situation is that any person who held an interest in

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[17] This result under Georgia state law is by no means clear. The 1953 version of Ga.Code Ann. § 67-2003 granted mechanics a lien for improvements or repairs on personal property and provided that this lien shall be superior to all other liens except liens for taxes and liens of which the mechanic has actual knowledge. The 1963 version of Ga.Code Ann. § 109A-9-310 reversed the priority provisions of § 67-2003 by providing that perfected security interests take priority over certain liens, including the mechanic's lien. However, in 1972 § 67-2003 was struck in its entirety and a new Code section 67-2003 was inserted in lieu thereof. With the exception of a new provision providing for a storage lien, this new version of § 67-2003 is substantially the same as the prior version and retains the superpriority provision for mechanic's liens. Crittenden maintains that the superpriority provision in the 1972 version of § 67-2003 was intentionally included by the legislature, and that the 1963 version of § 109A-9-310 was thus impliedly repealed insofar as it applied to mechanic's liens. Appellant argues that the retention of the superpriority provision in the present version of § 67-2003 was an oversight, and that there is no evidence that the legislature intended to change the application of § 109A-9-310 with respect to mechanic's liens. The few recent Georgia cases which mention these sections do not recognize or resolve this inconsistency. *Park Avenue Bank* v. *Bassford*, 232 Ga. 216, 205 S.E.2d 861 (1974); *Gwinnett Sales & Service* v. *Trust Company of Ga.*, 130 Ga.App. 31, 202 S.E.2d 255 (1973). Because of our decision to fashion a single federal rule, we need not wade further into this state law quagmire.

Bridges' tractor would justifiably rely on state law governing his rights. These expectations should not be thwarted merely because it later turns out that FHA also is an interested party. "By making farm loans, FHA became subject to the same requirements of local law which govern the validity of security interests in respect to all other lenders." *Connecticut Mutual Life Ins. Co.* v. *Carter*, *supra*, 446 F.2d at 139.[18]

This reasoning may be compelling in some situations. For example, if a particular state law granted superpriority status to mechanic's liens with or without notice of existing security interests, but the Uniform Commercial Code and the great weight of state authority required the mechanic to check the records and obtain a waiver from secured parties before commencing work, we might be loath to apply the U.C.C. rule even if we felt that it represented sound commercial policy. The mechanic might have justifiably

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[18] Our decision in the choice of law context that state law should not govern the rights and liabilities of FHA was based in part upon the possibility that state law might discriminate against a federal agency. This consideration is much less significant to our decision as to whether the federal rule should incorporate state law. While it is certainly correct that federal rights should not be placed within the power of any particular state court or legislature to change the applicable law. *U. S.* v. *Hext*, *supra*, 444 F.2d at 810-11, a decision by this court to incorporate state law would not mean that federal courts must blindly follow a state law which was designed to prejudice federal interests or which produced results consistently antagonistic to those interests. Federal jurisdiction and the fact that state law would apply only by virtue of incorporation into federal law would prevent such a result.

relied on state law in not checking the records, and it would be unfair to disappoint his expectations merely because the secured party turned out to be FHA. In such a situation if the state law policy was reasonable and did not unfairly burden FHA, we might decide that the state law rule should apply.

This, however, is not the case here. Regardless of whether FHA would have priority under Georgia law, *see* note 17 *supra*, no reasonable expectation of the mechanic would be thwarted by adopting a rule modeled after U.C.C. § 9-310 instead of incorporating the Georgia rule. Indeed, Crittenden is at least as well off under the U.C.C. rule as he would be under Georgia law. Moreover, application of U.C.C. principles in place of the Georgia rule rests on the sound policy basis which we have discussed above. Superpriority for mechanics has been embraced by Congress in the Tax Lien Act, 26 U.S.C. § 6323(b)(5), and by the overwhelming majority of states in their adoption of the model version of U.C.C. § 9-310. The limited priority of the mechanic's lien is not new to our jurisprudence, and even in the complexity of our modern commercial society, it is a doctrine of respectful antiquity and one not to be discarded facilely and without real justification by the evolving common law. We agree and concur in the view that uniformity in government lending is an important policy pursuit, but this does not necessitate granting the government automatic superiority. We must also consider the equities favoring the mechanic who labors on property upon which the government holds a lien. There is nothing destructive of the uniformity concept in according some validity to a mechanic's lien. We thus see no reason not to afford mechanics the protection found in U.C.C. 9-310 and the Federal Tax Lien Act § 6323(b)(5). The provisions of U.C.C. § 9-310 should, therefore, be used as a model for the creation of an analogous federal common law rule for resolving disputes over the relative priority of an FHA security interest and a mechanic's lien.

This result is consistent with our prior decisions. In *United States* v. *Hext*, *supra*, we held that "in fashioning the federal law that is applicable to suits arising from the FHA program we shall be guided by the principles set forth in Article 9 and other relevant portions of the Uniform Commercial Code." 444 F.2d at 810. Moreover, because the Uniform Commercial Code embodies rules of nationwide applicability, this result satisfies one of the principal justifications for the first in time rule—the need for a uniform rule of decision in administering a nationwide program. At the same time, application of Uniform Commercial Code principles ensures that the rights and duties of the FHA will be substantially the same as those of other lenders, and thus the reliance of third parties on state commercial rules will no longer be frustrated merely because a government lender enters the scene.[19]

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[19] We pause here to note that we have purposely not held that the Code and the general body of precedent developed by the Code states should automatically be applied to all FHA transactions. As we stated in *United States* v. *Hext*, *supra*:

IV. Application of the Federal Rule—Divvying Up the Tractor at Last

Having determined to look to the Uniform Commercial Code as a source for fashioning federal law applicable in this case, we find that Crittenden's mechanic's lien is superior to FHA's security interest at least to the extent of the $543.81 owing from repairs made during Crittenden's last possession of the tractor. We have already noted that after FHA perfected its security interest on February 2, 1972, Bridges began bringing his tractor to Crittenden for repairs. Crittenden did the necessary work and then returned the tractor to Bridges on each of six occasions. Between December 29, 1972 and December 21, 1973 Bridges accumulated a repair bill of $1607.47. Finally, on December 21, 1973 Bridges delivered the tractor for repairs costing $543.81. This last visit

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> [W]e are merely exercising the traditional judicial technique of making "use of a statutory rule as a model for the creation of an analogous judicial rule" which has been so ably discussed by Justice Roger J. Traynor of the Supreme Court of California. *See* Traynor, Statutes Revolving in Common Law Orbits, 17 Cath.U.L.Rev. 401, 420 (1968).

444 F.2d at 810 n.17 (emphasis supplied). While the Code generally should be used to supply the content of the federal common law rules governing suits arising from FHA transactions, in fashioning a federal rule specific Code language and judicial interpretations need not be followed if the federal courts deem them contrary to the weight of authority, inconsistent with FHA operations, or undesirable as precedent. *Cf. United States* v. *Hext, supra,* 444 F.2d at 811. The U.C.C., and in other contexts state law, can inform, but it need not rule.

left an unpaid bill of $2151.28 which Bridges was unable to pay. Crittenden retained possession of the tractor at that time and has remained in possession ever since.

U.C.C. § 9-310 provides that a mechanic's lien under state law upon goods in the lienholder's possession takes priority over a perfected security interest. As we discussed above, this Code section reflects sound policy and is not prejudicial to FHA's interests. We therefore adopt U.C.C. § 9-310, as the governing federal common law rule. Applying this rule, we first note that Georgia law recognizes a mechanic's lien for improvements made to personal property. Ga.Code Ann. § 67-2003. The Georgia statute is precursive, that is, it merely creates the possibility that under its aegis, the mechanic's lien will be granted superpriority under federal common law, the U.C.C., or state law. Here U.C.C. § 9-310 grants this state law lien priority if its "possession" requirement is satisfied. Because Crittenden was in continuous possession of the tractor from the time that the $543.81 portion of his lien arose, the possession requirement was satisfied and under the applicable law his lien takes priority over FHA's security interest at least to the extent of $543.81.[20]

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[20] This result is reached even if we assume that Georgia law does not grant superpriority to mechanic's liens. *See* note 17 *supra.* Ga.Code Ann. § 67-2003 creates the mechanic's lien, and federal law guided by U.C.C. § 9-310 grants that lien priority. U.C.C. § 9-310 provides priority for mechanic's liens over perfected security interests "unless the lien is statutory and the statute expressly provides otherwise." In this case

The only remaining issue is whether that portion of Crittenden's lien representing repairs made before his last possession of the tractor should be given priority over FHA's security interest.[21] U.C.C. § 9-310 provides in relevant part that "a lien upon goods in the [mechanic's] possession . . . takes priority over a perfected security interest." (emphasis supplied) A mechanic's lienor not in possession of the collateral is thus not granted priority. *See* G. Gilmore, Security Interests in Personal Property 873, 887-88 (1965); Comment, *Nonconsensual Liens Under Article 9*, 76 Yale L.J. 1649, 1656-61 (1967). This is true even when the state law does not require the mechanic to maintain possession in order to assert his lien against the debtor; possession is still required to maintain the

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the state statute creating the lien, Ga.Code Ann. § 67-2003, does not so provide and priority is thus established. However, in light of our decision to grant mechanic's liens priority over FHA security interests regardless of whether the relevant state law incorporates U.C.C. § 9-310, we would reach this result even if the state statute creating the mechanic's lien provided that the lien was not superior to prior perfected security interests. State law creates the lien; federal law governs its priority. In adopting U.C.C. § 9-310 we thus reject the "unless" clause quoted above. See our discussion in note 19 *supra*.

[21] It appears that Ga.Code Ann. § 67-2003 continues to recognize a mechanic's lien even after possession is lost, and we assume for purposes of this opinion that Crittenden's lien under state law totals $2151.28 ($543.81 for Crittenden's last continuous possession and $1607.47 for previous possessions). Because of our holding that a lien based on non-continuous possession is inferior to a perfected security interest, we need not determine whether under state law Crittenden's lien extends to the $1607.47 for prior possessions.

priority of the statutory lien over previously perfected security interests. *Forrest Cate Ford, Inc.* v. *Fryar*, 465 S.W.2d 882 (Tenn.App.1970). Unfortunately, the case law is not instructive in determining whether the possession requirement of U.C.C. § 9-310 cuts off the mechanic's priority forever once possession is lost; we have not discovered a single reported case in which possession was relinquished by a mechanic and subsequently regained.

We turn instead to the Federal Tax Lien Act to give content to the possession requirement of U.C.C. § 9-310. Section 6323(b)(5) of the Act grants priority to a mechanic's lien only if the mechanic "is, and has been, *continuously* in possession of such property from the time such lien arose." 26 U.S.C. § 6323 (b)(5) (emphasis supplied) While actual possession is not always necessary to meet this continuous possession requirement, the Tax Lien Act demands at least constructive possession by the lienholder. *Citizens Co-Op Gin* v. *United States*, *supra*, 427 F.2d at 695-97. Lienholders who relinquish actual possession must intend "to withhold the property from the owner until the improvement charges against the property are satisfied." *Id.* at 697.[22]

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[22] The improvement at issue in *Citizens Co-Op* required a *chain* of improvers. The court recognized that that the purposes of the superpriority provision of § 6323(b)(5) would be completely defeated if personal possession were required of each improver. So long as each member of the chain intended to withhold the property from the owner, possession by one was deemed constructive possession by all.

In light of the possession requirement found in the Uniform Commercial Code and continuous possession requirement of the Federal Tax Lien Act, we hold that a mechanic's lien is superior to an FHA security interest only to the extent that the mechanic continuously possesses the collateral.[23] Applying this rule

[23] Neither the legislative history of the Tax Lien Act, nor the cases decided under the U.C.C., nor the commentators have shed much light on the policy justification for this possession requirement. Perhaps it can be best understood in the context of the Uniform Commercial Code's general priority scheme. Article 9 of the Code allows a lender to perfect a security interest in collateral which is prior to virtually all subsequent interests in that collateral. This system facilitates commercial lending by assuring a lender that, once perfected, his interest will be superior to subsequent interests. Equally important, the filing requirements of U.C.C. §§ 9-401 and 9-402 provide notice to potential lenders of existing interests in the collateral. For reasons which we have already discussed, considerations of equity and fairness have led to the creation of the mechanic's lien exception in U.C.C. § 9-310 to the normal priority rules. While these considerations are persuasive immediately after repairs have been made and the owner's property is still in the mechanic's possession, at some point in time the mechanic's interest becomes indistinguishable from that of any other general creditor. Here, for example, immediately prior to Crittenden's last repair job the tractor was in Bridges' possession with some outstanding repair bills dating back almost a full year. At that point Crittenden hardly appears more entitled to special priority treatment than any other of Bridges' general creditors. In one sense, the possession requirement represents an attempt to draw the line between the repairman's status as a mechanic entitled to superpriority and his status as a general creditor.

Choosing possession to delineate these two statuses can be justified. The possession requirement allows the mechanic to be master of his own fate; he maintains superpriority as long as he retains possession of the collateral. Appellee argues

to the instant case, we conclude that Crittenden's mechanic's lien is superior to FHA's security interest only to the extent of $543.81. Crittenden was neither in actual nor constructive possession of the tractor during the time that the $1607.47 portion of his lien arose because he returned the tractor to Bridges after each repair job. Thus the continuous possession requirement was not met by Crittenden for the $1607.47 portion of his lien accumulated before his last possession of the tractor.

In summary, we have determined that under federal law Crittenden's mechanic's lien is superior to FHA's perfected security interest to the extent of $543.81. The judgment of the district court is af-

here that if he had retained possession of the tractor, he would have deprived Bridges of using a vehicle essential to the maintenance of the farm. Crittenden maintains that he not only improved the value of the tractor itself, but that by relinquishing possession of the tractor, he also increased the value of Bridges' crops, and consequently the value of FHA's security. This argument is not persuasive. The mechanic could have checked the records and then requested a release from the FHA and other secured parties. If the FHA would have been better off with the tractor in the debtor's possession, it would have given the mechanic a release. In any event the decision properly rests with the secured party. The FHA, with no notice of the intervening mechanic's lien, is not in a position to protect its rights and interests if Crittenden neither retains possession nor requests a release. Thus the possession requirement allows the mechanic to maintain the superpriority status of his lien by retaining possession or obtaining appropriate releases, while at the same time it ensures that holders of prior perfected security interests will receive notice of intervening interests affecting the value of their collateral.

firmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-4174

D.C. Docket No. CA 75-37-Col

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

versus

ZAC A. CRITTENDEN, d/b/a
Crittenden Tractor Company, DEFENDANT-APPELLEE.

Appeal from the United States District Court for the Middle District of Georgia

Before GOLDBERG and TJOFLAT, Circuit Judges and WYATT,* District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed

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* Senior United States District Judge, Southern District of New York, sitting by designation.

in part; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

November 21, 1977

ISSUED AS MANDATE: Feb. 14, 1978

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

February 6, 1978

TO ALL PARTIES LISTED BELOW:

No. 75-4174

USA *v.* ZAC A. CRITTENDEN, JR., ETC.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

By /s/ Brenda M. Hauck
Deputy Clerk

** On behalf of appellant, United States of America.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

Civil Action No. 75-37-COL

[Filed Sep. 25, 1975]

UNITED STATES OF AMERICA, PLAINTIFF

v.

ZAC A. CRITTENDEN, JR., doing business as
Crittenden Tractor Company, DEFENDANT

MEMORANDUM AND ORDER ON
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

The Defendant in the case above identified has filed a motion for summary judgment and a review of the pleadings, answers to interrogatories and affidavits indicates that there is no issue as to any fact material to a consideration of the legal question presented, and the Court has had the benefit of briefs filed by counsel in support of their respective positions.

Upon consideration, the Court determines that the Defendant's motion for summary judgment should be sustained for the following reasons:

(1) The Plaintiff does not have a perfected security interest in the property claimed by it because

the property was not adequately described in the financing statement upon which it relies.

(2) Even if it should be thought that the "description" of the property was adequate, the Defendant nevertheless had a special mechanic's lien against the property which has priority over the Plaintiff's security interest, and this is so regardless of whether "Georgia" law or "Federal" law is applied.

(3) Even if it should be thought that the "description" was adequate and that the Defendant did not have a special prior lien on the property, the Defendant is nevertheless entitled to assert an equitable lien on the property superior to any lien claimed by the Plaintiff. This is so because of considerations of right and justice as applied to the relationship of the parties and the circumstances of the case. To hold otherwise would result in the unjust enrichment of the Plaintiff at the expense of the Defendant.

As indicated, the Defendant's motion for summary judgment is hereby sustained and the Plaintiff's complaint is ordered dismissed.

IT IS SO ORDERED this 25th day of September, 1975.

J. ROBERT ELLIOTT
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 264740 9

Supreme Court, U. S.
FILED
NOV 16 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1644

UNITED STATES OF AMERICA,
Petitioner,

—*v.*—

ZAC A. CRITTENDEN, JR.,
d/b/a CRITTENDEN TRACTOR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED MAY 18, 1978
CERTIORARI GRANTED OCTOBER 2, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1644

UNITED STATES OF AMERICA,

Petitioner,

—*v.*—

ZAC A. CRITTENDEN, JR.,
d/b/a CRITTENDEN TRACTOR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Page
Relevant docket entries	1
Complaint	4
Exhibits to the Complaint:	
Ex. A: Security Agreement dated February 2, 1972	7
Ex. B: Financing Statement dated February 2, 1972 (File No. 6897)	11
Ex. C: Financing Statement dated February 2, 1972 (File No. 7020)	12
Defenses of Zac A. Crittenden, Jr.	13
Motion of Defendant for Summary Judgment	16
Affidavit of Zac A. Crittenden, Jr., with attached exhibits	17
Plaintiff's interrogatories to defendant	27
Defendant's Answers to Interrogatories	29
District Court Judgment	31
Order granting certiorari	32
The following additional items are contained in the appendix to the petition for a writ of certiorari and they need not be reprinted	
Opinion of the court of appeals	1a

	Page
Judgment of the court of appeals	37a
Notice that the petition for rehearing and rehearing *en banc* was denied	39a
Memorandum and order of the district court	40a

1

UNITED STATES DISTRICT COURT

Docket No. 75-0037

UNITED STATES OF AMERICA

v.

CRITTENDEN, ZAC A., JR. d/b/a
CRITTENDEN TRACTOR COMPANY

28 USC 1345—To recover collateral against which U.S. has lien.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1975	
5/1	Filed complaint and issued summons, copy mailed to U.S. Marshal, Macon, Ga. for service on Deft.
5/1	J.S. 5, initial report filed.
5/20	Filed Defenses of Zac A. Crittenden, Jr. d/b/a Crittenden Tractor Company, cert. of serv. thereon. (Deft. demands trial by jury.)
5/23	Received return of service of U.S. Marshal, Zac A. Crittenden was served on 5/8/75.
7-8	Filed Notice of Motion for Summary Judgment, by Defendant.
7-8	Filed Motion for Summary Judgment by defendant.
7-8	Received Brief in support of Motion for Summary Judgment by defendant.
7/22	Received Plaintiff's Brief in response to Defendant's Motion for Dismissal, cert. of serv. thereon.
7-24	Filed Plaintiffs Interrogatories to Defendant.
9-2	Received Defendant's Reply Brief.

DATE	PROCEEDINGS

9-2 Filed Defendant's Answers to Interrogatories.

9-25 Filed Memorandum and Order on Defendant's Motion for Summary Judgment, granting said motion.

9-25 Filed Judgment in accordance with Order of the Court. Civ. Order p. 553.

9-25 Judgment entered. (Copies mailed to Attorneys for parties).

9-25 Prepared J. S. 6.

11/21 Filed Notice of Appeal by U.S. Attorney. (copy mailed to all counsel of record and copy to CCA5.

11/21 File mailed to Clerk, U.S. District Court, Macon, Ga.

12/16 Record on Appeal forwarded to CCA-5.

1978

2-21 Filed Judgment issued as mandate of CCA 5 Affirming in Part and Reversing in part the Judgment of the District Court and Order of J. Elliott thereon making the mandate the judgment of the District Court. REMANDED TO DISTRICT COURT.

2-21 CASE RE-OPENED.

2-21 Prepared J. S. 5.

5/18 Filed Motion for Leave to Sell.

5/18 Filed Order of Judge Elliott allowing the sale of the Allis-Chalmers Diesel 21 tractor to Alston Bros. Farm, Inc. for $1,525.00.

DOCKET

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-4174

Date Docketed 11-25-75

Date Notice of Appeal Filed 11-21-75

[Caption Omitted]

1-19-76 Brief for Appellant (P-T) 1-26-76(P)

2-5-76 Brief for Appellee (M)

3-3-77 Supp. Brief for Appellant (T) (J)

3-2-77 Supp. Brief for Appellee (T) (J)

4-6-77 Case Argued ILG-GBT-WYATT

11-21-77 Affd. in Pt. & Reversed in Pt. ILG

1-9-78 Petition for Rehearing, Appellant, En Banc

2-6-78 Order Denying Rehearing (en banc)

1/27/76 Flg. Letter of Appellant dated 1-26-76 confirming telephone conversation wherein he was allowed to proceed on Orig. Record and 2 xerox copies (GG)

Feb. 14, 1978 Jdgt. as Mdt. Issd. to Clerk

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

Civil No. 75-37-Col.

[Filed at 8:30 A.M., May 1, 1975]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ZAC A. CRITTENDEN, JR.
doing business as CRITTENDEN TRACTOR COMPANY

COMPLAINT

The United States of America, plaintiff, by its attorney, Ronald T. Knight, United States Attorney for the Middle District of Georgia, acting under the direction of the Attorney General of the United States, alleges:

1. This is a suit of a civil nature brought by the United States of America, and jurisdiction of the Court is invoked under the provisions of Section 1345, Title 28, United States Code.

2. Defendant, Zac A. Crittenden, Jr., is a resident of Randolph County, Georgia, within the jurisdiction of the Middle District of Georgia, and is doing business as Crittenden Tractor Company. Defendant's mailing address is Shellman, Georgia 31786.

3. Plaintiff, acting through Farmers Home Administration, U.S. Department of Agriculture, did make to Ralph B. Bridges of Terrell County, Georgia the following listed operating loans:

Date of Promissory Note	Principal Sum of Loan
1. November 27, 1970	$12,880.00
2. August 20, 1971	1,600.00
3. February 2, 1972	21,900.00

4. On December 22, 1970 to secure the first loan described in paragraph 3 and any additional loans, advances to him and/or expenditures, Mr. Bridges executed a security agreement granting to plaintiff a security interest in his crops and farm equipment. This security interest was perfected by the filing of a financing statement in the office of the Clerk of Superior Court for both Terrell County (File No. 6148) and Randolph County (File No. 6529).

5. Because of changes in collateral on February 2, 1972, the said Ralph B. Bridges did execute to plaintiff a second security agreement granting a security interest in his crops and farm equipment. This security interest was perfected by the filing of a financing statement in the office of the Clerk of Superior Court for both Terrell County (File No. 6897) and Randolph County (File No. 7020). A copy of this security agreement and a copy of the secured party's copy of each financing statement are attached hereto as Exhibits A, B and C and are made a part of this paragraph by reference.

6. Included in the farm equipment listed in the security agreement described in paragraph 5 is an Allis Chalmers, Diesel 21 tractor with a serial No. 2417 which has an estimated value of approximately $5,000.00.

7. Notwithstanding the security interest in this tractor which is a first and prior interest in this tractor, the defendant did on or about March 14, 1974 have the Sheriff of Randolph County levy on the said tractor and defendant did take possession of this tractor and to the best of plaintiff's knowledge said defendant continues to be in posssesion of the tractor.

8. Plaintiff had no knowledge of this levy nor was it given any notice of any claim or lien asserted by said defendant.

9. Plaintiff learned of the levy when the said Ralph B. Bridges did file his petition in bankruptcy in the United States District Court for the Middle District of Georgia, Americus Division, and an attempt was made by plaintiff to locate its collateral.

10. Plaintiff is entitled to immediate possession of the said tractor because Mr. Bridges has defaulted under the

terms of the loan instruments by allowing defendant to levy against the tractor and also because of his filing a petition in bankruptcy. The unpaid balance on Mr. Bridges' loan accounts presently is in excess of the value of the said tractor.

11. Demand has been made on defendant by plaintiff to turn over the tractor to the plaintiff but defendant has failed and refused to release the tractor to the plaintiff.

WHEREFORE, plaintiff demands judgment against the defendant and prays that the Court direct the defendant to either turn over the said tractor to plaintiff or in the alternative should he no longer have possession of the tractor to pay the plaintiff the value of said tractor, plus interest. In addition, plaintiff prays that defendant be directed to pay the costs of this action.

RONALD T. KNIGHT
United States Attorney

By _____
Assistant United States Attorney

Position 1

USDA–FHA
Form FHA 440–4
(Rev. 1–1–72)

SECURITY AGREEMENT

(CHATTELS AND CROPS)

EXHIBIT A

I. THIS SECURITY AGREEMENT is made between the United States of America acting through the Farmers Home Administration (herein called Secured Party) and Ralph B. Bridges

and _____ (herein called Debtor), whose mailing address is Dawson, Ga. Rt 3 31742

II. WHEREAS Debtor is justly indebted to Secured Party as evidenced by one or more certain promissory note(s) or other instrument(s), herein called "note" (if more than one note is described below, the word "note" as used herein shall be construed as referring to each note singly or all notes collectively, as the context may require), said note being executed by Debtor, being payable to the order of Secured Party in installments as specified therein, authorizing acceleration of the entire indebtedness at the option of Secured Party upon any default by Debtor, and being further described as follows:

Date	Principal Amount	Last Installment Due
8-20- 19 71	$ 1600.00	11-1 19 74
Feb. 2 19 72	$ 21,900.00	2-2 19 73
19	$	19
19	$	19
19	$	19
19	$	19
19	$	19

And the note evidences a loan to Debtor, and Secured Party, at any time, may assign the note and insure the payment thereof to any extent authorized by the Consolidated Farmers Home Administration Act of 1961;

And if payment of the note is insured by Secured Party, Secured Party may retain the right to a specified portion of the payments on the note;

And a condition of the insurance of payment of the note will be that the holder will forego his rights and remedies against Debtor and any others in connection with the loan evidenced thereby, as well as any benefit of this instrument, and will accept the benefits of such insurance in lieu thereof, and upon Secured Party's request will assign the note to Secured Party;

And it is the purpose and intent of this instrument that, among other things, at all times when the note is held by Secured Party, or in the event Secured Party should assign this instrument without insurance of the note, this instrument shall secure payment of the note; but when the note is held by an insured holder, this instrument shall not secure payment of the note or attach to the debt evidenced thereby, but as to the note and such debt shall constitute an indemnity security agreement to secure Secured Party against loss under its insurance contract by reason of any default by Debtor;

NOW, THEREFORE, in consideration of said loan(s) and (a) at all times when the note is held by Secured Party, or in the event Secured Party should assign this instrument without insurance of the payment of the note, to secure prompt payment of the note and any renewals and extensions thereof and any agreements contained therein, and any additional loans to Debtor heretofore or hereafter made or insured by Secured Party under the then existing provisions of Subtitle B or C of the foregoing statute, (b) at all times when the note is held by an insured holder, to secure performance of Debtor's agreement herein to indemnify and save harmless Secured Party against loss under its insurance contract by reason of any default by Debtor, and (c) in any event and at all times to secure the prompt payment of all advances and expenditures made by Secured Party, with interest, as hereinafter described, and the performance of every covenant and agreement of Debtor contained herein or in any supplementary agreement:

DEBTOR HEREBY GRANTS to Secured Party a security interest in his interest in the following collateral, including the proceeds and products thereof:

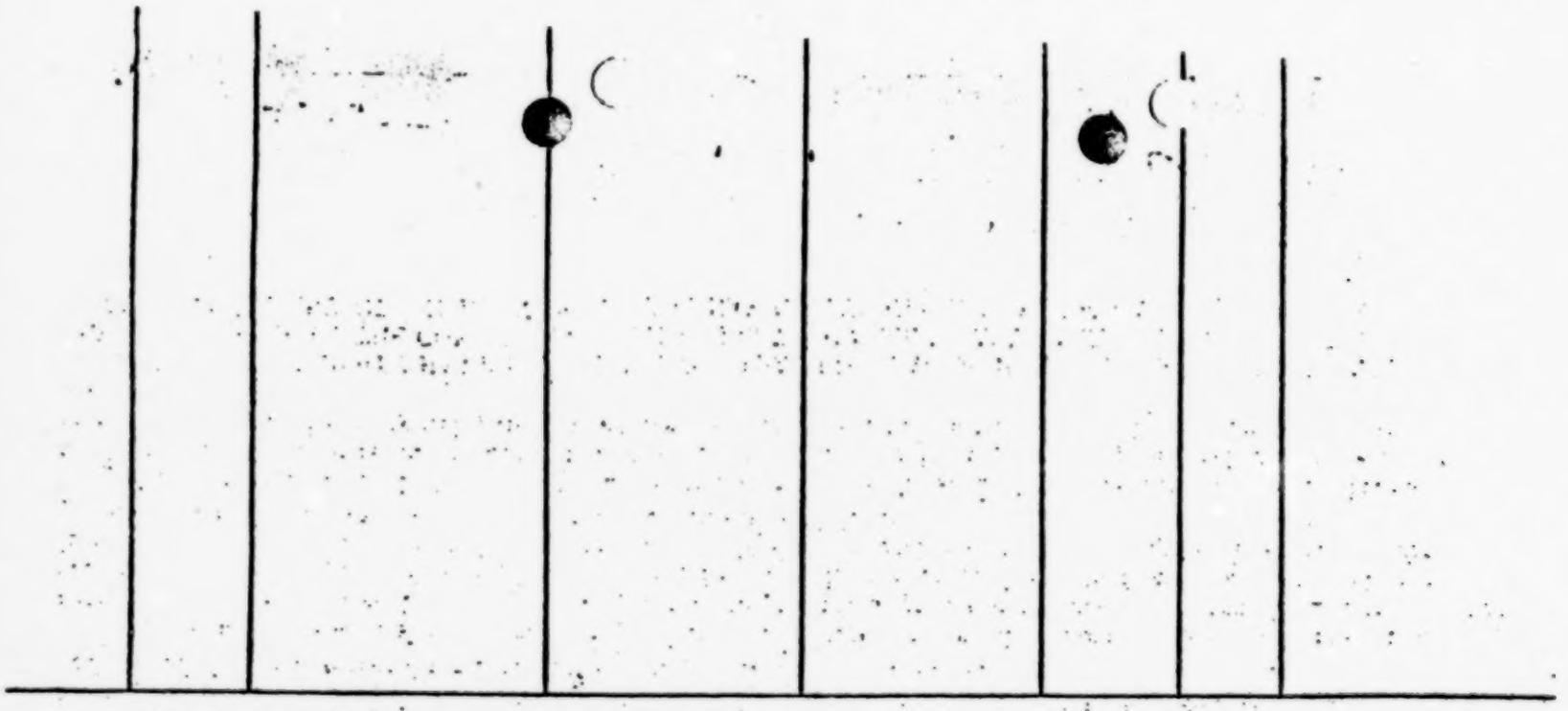
Item 1. All crops, annual and perennial, and other plant products now planted, growing or grown, or which are hereafter planted or otherwise become growing crops or other plant products (a) within the one-year period or any longer period of years permissible under State law, or (b) at any time hereafter if no fixed maximum period is prescribed by State law, on the following described real estate:

Farm(s) or Other Real Estate * *Owner*	*Approximate No. of Acres*	*County and State*	*Approximate Distance and Direction from a Named Town or other Description*
Earl Gill	20.3	Terrell, Georgia	7 mi NW of Dawson, Georgia
Wilbur Gamble and Bobby Locke	242.8	Randolph, Georgia	3½ mi S Cuthbert

* Owner shown in related Financing Statement, except if informed of ownership change show reputed new owner.

Item 2. All farm and other equipment (except small tools and small equipment unless described below), and inventory, now owned or hereafter acquired by Debtor, together with all replacements, substitutions, additions, and accessions thereto, including but not limited to the following:

Line No.	Quantity	Kind	Manufacturer	Size and type	Condition	Year of manufacture	Serial or motor No.
	1	tractor	Allis Chalmers	Deisel 21	good	1968	2417
	1	Combine	Lilliston		good	1965	218
	1	Bottom Plow	John Deere	3 bottom 16 "	good	415 A	
	1	Cultivator	John Deere	17 ft	good	1970 RR4	
	1	Plow	Glencol Chisils	9 ft	good	1970	
	1	mower	Lilliston	7 ft	good	unknown	
	1	drag Harrow		10 ft	good	unknown	
	2	Herbicide tanks		110 gal. stainless steel			
	1	harrow	John Deere	10 ft AW	good	unknown	
	1	tractor	David Brown	Model 990	good	1963 Sr 494684	
	1	Harrow	Taylor Way	14 ft model 20018	good	1971	83769



III. DEBTOR WARRANTS, COVENANTS, AND AGREES THAT:

A. Debtor is the absolute and exclusive owner of the above-described collateral, and any marks or brands used to describe livestock are the holding brands and carry the title, although the livestock may have other marks or brands, and such collateral is free from all liens, encumbrances, security and other interest except (1) any existing liens, encumbrances, security or other interests in favor of Secured Party which shall remain in full force and effect, (2) any applicable landlord's statutory liens, and (3) other liens, encumbrances, security or other interests, as follows:

Ford Motor Credit Co. F/S 5917 8-15-70 KMC 4 row PN Shaker Sr. 725 KMC Vine cutter Ins. Debt. 1589.79

and Debtor will defend the collateral against the claims and demands of all other persons. Reference to the above liens, encumbrances, security and other interests is for warranty purposes only and does not indicate their priority.

B. Statements contained in Debtor's loan application(s) are true and correct; and Debtor will (1) use the loan funds for the purposes for which they were or are advanced, (2) comply with such farm and home management plans as may be agreed upon from time to time by Debtor and Secured Party, (3) care for and maintain the collateral in a good and husbandlike manner, (4) insure the collateral in such amounts and manner as may be required by Secured Party, and if Debtor fails to do so, Secured Party, at its option, may procure such insurance, (5) permit Secured Party to inspect the collateral at any reasonable time, (6) not abandon the collateral or encumber, conceal, remove, sell or otherwise dispose of it or of any interest therein, or permit others to do so, without the prior written consent of Secured Party, and (7) not permit the collateral to be levied upon, injured or destroyed, or its value to be impaired, except by using harvested crops in amounts necessary to care for livestock covered hereby.

C. Debtor will pay promptly when due all (1) indebtedness evidenced by the note and any indebtedness to Secured Party secured hereby, (2) rents, taxes, insurance premiums, levies, assessments, liens, and other encumbrances, and costs of lien searches and maintenance and other charges now or hereafter attaching to, levied on, or otherwise pertaining to the collateral or this security interest, (3) filing or recording fees for instruments necessary to perfect, continue, service, or terminate this security interest, and (4) fees and other charges now or hereafter required by regulations of the Farmers Home Administration. At all times when the note is held by an insured holder, Debtor shall continue to make payments on the note to Secured Party, as collection agent for the holder.

D. If the note is insured by Secured Party, Debtor will indemnify and save harmless Secured Party against any loss by reason of any default by Debtor.

E. At all times when the note is held by an insured holder, any amount due and unpaid under the terms of the note to which the holder is entitled may be paid by Secured Party to the holder of the note for the account of Debtor. Any amount due and unpaid under the terms of the note, whether it is held by Secured Party or by an insured holder, may be credited by Secured Party on the note and thereupon shall constitute an advance by Secured Party for the account of Debtor. Any advance by Secured Party as described in this paragraph shall bear interest at the note rate from the date on which the amount of the advance was due to the date of payment to Secured Party, provided that Borrower shall be required to pay interest on only the principal portion of such advance unless otherwise provided in the regulations of the Farmers Home Administration.

F. Whether or not the note is insured by Secured Party, Secured Party may at any time pay any other amounts required herein to be paid by Debtor and not paid by him when due, including any costs and expenses for the preservation or protection of the collateral or this security interest, as advances for the account of Debtor. All such advances shall bear interest at the rate borne by the note which has the highest interest rate.

Position 1

6

G. All advances by Secured Party as described in this instrument, with interest thereon, shall become immediately due and payable by Debtor to Secured Party without demand at the place designated in the latest note executed by Debtor, and shall be secured hereby. No such advance by Secured Party shall relieve Debtor from breach of his covenant to pay. Any payment made by Debtor may be applied on the note or any indebtedness to Secured Party secured hereby, in any order Secured Party determines.

H. In order to secure or better secure the aforesaid obligations or indebtedness, Debtor will execute and deliver to Secured Party at any time, upon demand, such additional security instruments on such real and personal property as Secured Party may require.

IV. IT IS FURTHER AGREED THAT:

A. Until default Debtor may retain possession of the collateral.

B. Default shall exist hereunder if Debtor fails to perform or discharge any obligation or to pay promptly any indebtedness hereby secured or to observe or perform any covenants or agreements herein or in any supplementary agreement contained, or if any of Debtor's representations or warranties herein prove false or misleading, or upon the death, bankruptcy, insolvency or incompetency of Debtor or any person so called herein. Upon any such default:

1. Secured Party, at its option, with or without notice as permitted by law, may (a) declare the unpaid balance on the note and any indebtedness secured hereby immediately due and payable, (b) enter upon the premises and take possession of, cultivate and harvest crops, repair, improve, use, and operate the collateral or make equipment unusable, for the purpose of protecting or preserving the collateral or this lien, or preparing or processing the collateral for sale, and (c) exercise any sale or other rights accorded by law.

2. Debtor hereby (a) agrees to assemble the collateral and make it available to Secured Party at such time(s) and place(s) as designated by Secured Party, and (b) waives all notices, exemptions, compulsory disposition and redemption rights.

3. A default shall exist under any other security instrument held or insured by Secured Party and executed or assumed by Debtor on real or personal property. Likewise, default under any such other security instrument shall constitute default hereunder.

C. Proceeds from disposition of collateral shall be applied first on expenses of retaking, holding, preparing for sale, selling and the like and for payment of reasonable attorneys' fees and legal expenses incurred by Secured Party, second to the satisfaction of prior security interests or liens to the extent required by law and in accordance with current regulations of the Farmers Home Administration, third to the satisfaction of indebtedness secured hereby, fourth to the satisfaction of subordinate security interests to the extent required by law, fifth to any other obligations of Debtor owing to or insured by Secured Party, and sixth to Debtor. Any proceeds collected under insurance policies shall be applied first on advances and expenditures made by Secured Party, with interest, as hereinabove provided, second on the debt evidenced by the note, unless Secured Party consents in writing to their use by Debtor under Secured Party's direction for repair or replacement of the collateral, third on any other obligation of Debtor owing to or insured by Secured Party, and any balance shall be paid to Debtor unless otherwise provided in the insurance policies. Debtor will be liable for any deficiency owed to Secured Party after such disposition of proceeds of the collateral and insurance.

D. It is the intent of Debtor and Secured Party that to the extent permitted by law and for the purpose of this Agreement, no collateral covered hereby is or shall become realty or accessioned to other goods.

E. This Agreement is subject to the present regulations of the Farmers Home Administration, and to its future regulations not inconsistent with the express provisions hereof.

F. If any provision of this Agreement is held invalid or unenforceable, it shall not affect any other provisions hereof, but this Agreement shall be construed as if it had never contained such invalid or unenforceable provision.

G. The rights and privileges of Secured Party under this Agreement shall inure to the benefit of its successors and assigns. All covenants, warranties, representations, and agreements of Debtor contained in this Agreement are joint and several and shall bind personal representatives, heirs, successors, and assigns.

H. If at any time it shall appear to Secured Party that Debtor may be able to obtain a loan from a production credit association, a Federal land bank, or other responsible cooperative or private credit source, at reasonable rates and terms for loans for similar purposes and periods of time, Debtor will, upon Secured Party's request, apply for and accept such loan in sufficient amount to pay the note and any indebtedness secured hereby and to pay for any stock necessary to be purchased in a cooperative lending agency in connection with such loan.

I. Secured Party shall have the sole and exclusive rights as the secured party hereunder, including but not limited to the power to grant or issue any consent, release, subordination, continuation statement or termination statement, and no insured holder shall have any right, title, or interest in or to the security interest created by this Agreement or any benefits hereof.

J. SECURED PARTY HAS INFORMED DEBTOR THAT DISPOSAL OF PROPERTY COVERED BY THIS SECURITY AGREEMENT WITHOUT THE CONSENT OF SECURED PARTY, OR MAKING ANY FALSE STATEMENT IN THIS SECURITY AGREEMENT OR ANY OTHER LOAN DOCUMENT, MAY CONSTITUTE A VIOLATION OF FEDERAL CRIMINAL LAW.

Ralph B Bridges

(Debtor) Ralph B. Bridges (SEAL)

Feb. 2, 1972

(Date)

(Debtor) (SEAL)

GPO 825-878

Form FHA 440-25
(Rev. 5-25-66)

Position 1

UNITED STATES DEPARTMENT OF AGRICULTURE

FARMERS HOME ADMINISTRATION

EXHIBIT B

FINANCING STATEMENT

This statement is presented for filing pursuant to the Uniform Commercial Code. Please note filing information on the copy and return it to the Secured Party at its address shown below.

DEBTOR(S)	SECURED PARTY	For Filing Officer
Ralph B. Bridges (Name)	UNITED STATES OF AMERICA acting through FARMERS HOME ADMINISTRATION	File Number - 6897 Time - 9: A.M. Date - 2/2/72
Dawson, Ga. Rt 3	Dawson, Ga.	Eleanor L. Ferris Terrell County Clerk
31742 (Mailing Address)	(County Office Address) 31742	

1. This Financing Statement covers the following types or items of collateral, including proceeds and products thereof:

   (a) Crops, livestock, supplies, other farm products, farm equipment and inventory.

   (b) _____

2. Disposition of such collateral is not hereby authorized.

3. Crops covered hereby are growing or are to be grown on, and any goods covered hereby which are or are to become fixtures are or are to be affixed to, the following-described real estate:

Farm(s) or Other Real Estate • Owner	Approximate No. of Acres	County and State	Approximate Distance and Direction From a Named Town
Earl Gill	20.3	Terrell, Georgia	located in LL 203,182 in 11th LD 7 mi NW of Dawson Jones Mill Paved Road
Wilbur T. Gamble and Bobby Locke	242.8	Randolph, Georgia	located on LL 76,41,42,55,56,74 in GMD 1566 3½ mi S of Cuthbert on Public Work Camp road

Ralph B. Bridges
(Signature of Debtor)

Ralph B. Bridges

(Signature of Debtor)

UNITED STATES OF AMERICA

By Wallace L. Hinson

Title Wallace L. Hinson
County Supervisor
Farmers Home Administration

*Record owner if required by State law, otherwise reputed owner.

GPO 825-261

FHA 440-25 (Rev. 5-25-66)

11

Form FHA 440–25
(Rev. 5–25–66)

Position 1

UNITED STATES DEPARTMENT OF AGRICULTURE
FARMERS HOME ADMINISTRATION

FINANCING STATEMENT EXHIBIT C

This statement is presented for filing pursuant to the Uniform Commercial Code. Please note filing information on the copy and return it to the Secured Party at its address shown below.

DEBTOR(S)	SECURED PARTY	For Filing Officer
Ralph B. Bridges (Name)	UNITED STATES OF AMERICA acting through FARMERS HOME ADMINISTRATION	FILE NO. 7020
Dawson, Ga. Rt. 3 (Name)	Dawson, Ga. (County Office Address)	DATE: 2/2/72
31742 (Mailing Address)	31742	TIME: 10:30 A.M.
		Randolph County, Ga.
		Louise Sharley C
		Louise Sharley
		By Wynell B. Woodall Dep Clerk

1. This Financing Statement covers the following types or items of collateral, including proceeds and products thereof:

   (a) Crops, livestock, supplies, other farm products, farm equipment and inventory.

   (b) _____

2. Disposition of such collateral is not hereby authorized.

3. Crops covered hereby are growing or are to be grown on, and any goods covered hereby which are or are to become fixtures are or are to be affixed to, the following-described real estate:

Farm(s) or Other Real Estate * Owner	Approximate No. of Acres	County and State	Approximate Distance and Direction From a Named Town
Earl Gill	20.3	Terrell, Georgia	located in LL 203,182 in 11th LD 7 mi NW of Dawson on Jonas Mill Paved Road
Wilbur T. Gamble and Bobby Locke	242.8	Randolph, Georgia	located on LL 76,41,42,55,56,74 in GMD 1566 3½ mi S of Cuthbert on Public Work Camp road

Ralph B. Bridges (Signature of Debtor)

Ralph B. Bridges

(Signature of Debtor)

UNITED STATES OF AMERICA

By Wallace L. Hinson
Wallace L. Hinson
County Supervisor

Title
Farmers Home Administration

*Record owner if required by State law, otherwise reputed owner.

GPO 825-261

FHA 440–25 (Rev. 5–25–66)

12

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

[Caption Omitted]

DEFENSES OF ZAC A. CRITTENDEN, JR., DOING BUSINESS AS CRITTENDEN TRACTOR COMPANY, DEFENDANT

FIRST DEFENSE: The complaint fails to state a claim against defendant, or against the tractor to which reference is made in the complaint, upon which relief can be granted.

SECOND DEFENSE: Defendant admits the allegations contained in Paragraphs No. 1, 2 and 11 of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs No. 3, 4, 5, 6, 8 and 9 of the complaint; denies the allegations contained in Paragraphs No. 7 and 10 of the complaint; and denies each and every other allegation contained in the complaint.

THIRD DEFENSE: Defendant holds a first and prior lien against the tractor belonging to Ralph B. Bridges, to-wit, Allis-Chalmers Diesel 21 Tractor, Serial No. 2417, because of work done and material furnished by defendant in repairing said tractor in the total amount of $2,151.28, a reasonable charge for said work done and material furnished. Upon completion of such repair work, defendant made several demands for payment upon the said Ralph B. Bridges, who failed and refused to pay said sum or any part thereof. Defendant is in possession of said tractor and has been in continuous possession of it since it was delivered to him by the said Bridges for the purpose of making the aforesaid repair work. On or about March 14, 1974, defendant com-

menced proceedings in Randolph County Superior Court to foreclose his mechanic's lien against said property by filing an affidavit of foreclosure. An execution issued on said affidavit and the sheriff of Randolph County levied said execution upon the aforesaid tractor. Said tractor is, and has been since March 14, 1974, in custodia legis.

The aforesaid debt of $2,151.28 owed by the said Ralph B. Bridges to defendant is true, due, just and unpaid.

At the time the aforesaid repair work, the doing of work and the furnishing of materials, upon said tractor, was performed by defendant, defendant had no notice or knowledge whatever of the claim of the United States against the said Bridges as set forth in its complaint in this case, or of any financing statement, security agreement or claim of the United States or any other party affecting or relating to said tractor or the said Bridges.

Defendant claims, and hereby asserts, a first and prior mechanics lien, as provided by the provisions of Section 67-2003, Ga. Code of 1933, as amended (Acts, Georgia General Assembly, 1972, page 415, et seq.), against the above described Allis-Chalmers Tractor which is now, and, since the doing of said repair work, has been in the possession of defendant.

FOURTH DEFENSE: Defendant hereby incorporates herein by reference the allegations set forth in his Third Defense above.

Defendant is entitled to pursue his remedies under Georgia law, to collect his claim of $2,151.28, against Ralph B. Bridges by foreclosing his mechanic's lien against the aforesaid tractor. Defendant is, and at all relevant times has been, in possession of said tractor. The United States has never perfected a security agreement or any security interest in said tractor by complying with the requirements of Georgia law.

Defendant demands trial by jury of the issues in the above stated case.

Address: /s/ _____
A'DELBERT BOWEN

111 Court Street
Cuthbert, Georgia 31740

HATCHER, STUBBS, LAND,
HOLLIS & ROTHSCHILD

Address: By /s/ _____
ALBERT W. STUBBS
Attorneys for Defendant

P.O. Box 2707
Columbus, Georgia 31902

CERTIFICATE OF SERVICE

Columbus, Georgia
May 20, 1975

I, ALBERT W. STUBBS, certify that I am of counsel for the defendant in the foregoing case, and that I have this day served the foregoing Defenses on the plaintiff by placing a copy thereof in a sealed wrapper, with postage prepaid, addressed to Edgar W. Ennis, Jr., Assistant U.S. Attorney, Post Office Box U, Macon, Georgia, 31202, the attorney for Plaintiff United States of America, and depositing it in a United States mailbox.

/s/ Albert W. Stubbs

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

[Caption Omitted]

MOTION OF DEFENDANT
FOR SUMMARY JUDGMENT

The defendant, ZAC A. CRITTENDEN, JR., doing business as CRITTENDEN TRACTOR COMPANY, by A'Delbert Bowen and Hatcher, Stubbs, Land, Hollis & Rothschild, his attorneys, hereby moves the Court to enter summary judgment in his favor on the ground that the pleadings and the affidavit of Zac A. Crittenden, Jr., which is hereto attached, show that there is no genuine issue as to any material fact and that defendant is entitled to such summary judgment as a matter of law.

/s/ A'Delbert Bowen
A'DELBERT BOWEN

HATCHER, STUBBS, LAND,
HOLLIS & ROTHSCHILD

By /s/ Albert W. Stubbs
Attorneys for Defendant
Zac A. Crittenden, Jr.,
doing business as
Crittenden Tractor Company

Address:

P.O. Box 2707
Columbus, Georgia 31902

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

[Caption Omitted]

AFFIDAVIT OF ZAC A. CRITTENDEN, JR.

GEORGIA, MUSCOGEE COUNTY.

Personally appeared before me, the undersigned attesting witness, ZAC A. CRITTENDEN, JR., who, first being duly sworn, deposes and on oath says as follows:

1.

I am the defendant in the above stated case. I have personal knowledge of the facts and statements set forth in this affidavit.

2.

I make this affidavit for use as evidence in support of my motion for summary judgment in the above stated case, to be submitted to Honorable J. Robert Elliott, United States District Judge, on briefs, pursuant to the local rule of Court.

3.

At all times herein related I was the owner and operator of a farm implement sales and service business located in the City of Shellman, Randolph County, Georgia, which business included the furnishing of materials, parts and labor for the repair of tractors.

4.

At all times herein related Ralph B. Bridges was a resident of Dawson, Terrell County, Georgia.

5.

During the period from September 26, 1972, to December 21, 1973, I performed repair jobs on a 1968 Model Allis-Chalmers Diesel 21 Tractor, Serial No. 2417, which the said Ralph B. Bridges brought to my place of business and asked me to repair.

6.

Attached hereto, marked Exhibit "A" and incorporated herein by reference as fully as if the same were set forth herein, is a certified copy of my shop record for the account of said Ralph B. Bridges from September 26, 1972, to date. This is a record kept by me in the regular course of my business. The entries on it are, in the regular course of my business, made at the time of the events to which they relate. Said entries are true and correct records of work done and material furnished by me in repairing said tractor on the dates indicated on said record. The charges shown on said record are reasonable charges for the respective items and have never been questioned by the said Bridges or anyone else.

7.

The balance owed me by Ralph B. Bridges on said tractor account is $2,151.28, which sum is true, due, just and unpaid. I have made numerous demands on the said Ralph B. Bridges for said sum, but he has failed and refused to pay it or any part of it. However, he has never denied or questioned the fact that he owes me this money.

8.

Prior to the time I levied on said tractor, as hereinafter set forth, I had no knowledge or notice whatever that the said Bridges owed the United States or the Farmers Home Administration, U.S. Department of Agriculture, any money or that there was a lien, claim, security interest, encumbrance, mortgage, bill of sale to secure debt or conditional sales contract against the above described tractor in favor of the United States,

the Farmers Home Administration, U.S. Department of Agriculture, or any other person or party.

9.

I have had continuous and exclusive possession of said tractor at my place of business ever since the date of the last item on my account, December 21, 1973, and still have exclusive possession of said tractor.

10.

On March 14, 1974, in order to foreclose my mechanic's lien against said tractor, I made an affidavit before the Clerk of the Superior Court of Randolph County, Georgia, and obtained an execution upon said tractor. On that date the Sheriff of said County levied said execution upon said tractor, but allowed said tractor to remain in my possession as bailee in order to avoid incurring storage costs. True and correct copies of said affidavit, said execution, and said levy are hereto attached, marked respectively Exhibits "B", "C", and "D", and incorporated herein by reference as fully as if the same were set forth herein.

11.

The first time I had any notice or knowledge of any claim or demand of the United States or the Farmers Home Administration, U.S. Department of Agriculture, against said Ralph B. Bridges, or of any lien, claim, encumbrance, security interest, mortgage, bill of sale to secure debt or conditional sales contract against said tractor in favor of anyone was after March 14, 1974, the date of the aforesaid levy, when a representative of the Farmers Home Administration, U.S. Department of Agriculture, demanded that I release said tractor to him.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal on this the 27th day of May, 1975.

/s/ Zac A. Crittenden, Jr. (L.S.)
ZAC A. CRITTENDEN, JR.

Sworn to and subscribed before me:

/s/ [Illegible]
Notary Public, Randolph County, Georgia.

[SEAL]

Account No. _____ Sheet No. _____

NAME Ralph Bridges

ADDRESS Rt. 3 Terms

Dresden, Tn. Rating

Credit Limit

DATE 1972	ITEMS	FOLIO	✓	DEBITS	✓	CREDITS	DR. OR CR.	BALANCE
	Fwd.							2054
9-26	Gasket 3.36 Gas 24.03			38				2092
10-4	Paid					2092		000
11-29	Filter 2.06 Gas .06			212				212
12-5	filter 3.20 filter 19.71 filter 6.00 Gas .87			2978				3190
4-12	pump assy 3147.13 manifold 10.65 gskt .25 oil 53.67	13.97		4794				8157
16	coupling 6.81 nipples .50 Gas .22			153				8310
5-22	connings 6.28 clamp 18.15 manifold 13.75 manifold 7.00 manifold 13.5	2.70	51.30					
	regulator 54.00 oil pump screen 11.50 seal 7.83 seal 7.95 gskt 3.15	7.25						
	Hose fittings pin seal rod valve assy 27.98 4.28 .45 8.20 22.45 13.65 1.60	4.15						
	seals 2.10 bolt 1.47 kitchen assy 17.75 5.15 6.00 Sig fitting gasket 2.50	15.48						
	crankshaft grinding 25.00 labor 120.00			10331				122241
29	cover 22.45 gasket 8.63 lining kit .97 .18 .58 spring brush	22.51						
	pump 14.65 fitting 2.10 Gas 2.78			153				131776
6-19	gskt .30 ring 12.25 Sig 16.79 Skim .40 gskt .35 skim .40	2.75						
	valve assy 26.60 seal kit 4.15 spacers 4.55 seal .34	1.78	4.30	1262				142038
7-10	ring 1.18 lower 3.00 pin 2.07 roller .90 ring 78 lower	13.50	2.75					
	pin .45 pin 1.92 link .18 seal 4.24 gskt 3.02 pin .23		.70					
	Gas 4.08							
	13 Bag 28.93 bolt 8.16 clip .84 lower 6.12 shaft 66.97		5.27	5692				145730
	17 Cellar 26.06 shaft 8.81 bushing 3.36 bushing .42		1.47	1103				156733
12-21	valve 8.30 valve 11.80 ring 2.60 gskt 9.55 gskt 2.25 valve keys		4.80	4314				160747
	gskt 5.28 gskt 25.00 oil fitting 5.69 gskt 2.10 gskt 5.00		58.00					
	gskt .35 gskt 2.25 bolt .40 fitting 2.30 clamp .25 holder		19.90					
	ring 1.60 plastic rep 188.00 Antifreeze 4.00 Gas 10.74 labor		1.50	5431				216128

Certified: A true copy.
Eric A. Crittenden, Jr.

Exhibit A

AFFIDAVIT FOR FORECLOSURE OF LIEN ON PERSONAL PROPERTY

STATE OF GEORGIA

COUNTY OF RANDOLPH

There personally appeared before me, the undersigned officer of this State and County authorized to administer oaths, Zac A. Crittenden, Jr., who, after being duly sworn, says under oath that he is a mechanic and bailee for hire of labor and services, being the owner and operator of a farm implement and tractor repair and maintenance service under the style and name of Crittenden Tractor Company; that Ralph B. Bridges of Terrell County, Georgia, is indebted to him, as such mechanic and bailee, in the amount of $ 2,151.28 for repairs to an Allis-Chalmers Tractor, Model D21, Serial No. 2714, Mtr. No. 3D-04490; that said amount is due and unpaid, the same having become due as follows:

On completion of repairs to said tractor on December 21, 1973 $ 2,151.28

that a demand for payment of said amount has been made upon said debtor, and that said debtor refused, and still refuses, to pay the same; and that deponent, Zac A. Crittenden, Jr. has fully completed said contract of repair and bailment as aforesaid.

Wherefore, affiant now comes, within one year after said debt became due, and makes this affidavit for the purpose of foreclosing his lien upon the said Tractor, and prays that an execution may issue as provided for in the Code of Georgia, Section 67-2401.

Zac A. Crittenden, Jr.

Sworn to and subscribed before me,
this 14th day of March, 1974.

O'a Delbert Bower
Notary Public, Randolph County, Georgia
(N.P. SEAL)

Exhibit B

STATE OF GEORGIA

COUNTY OF RANDOLPH

TO ALL AND SINGULAR THE SHERIFFS OF SAID STATE AND THEIR LAWFUL DEPUTIES:

You are commanded that of the goods, chattels, lands and tenements of Ralph B. Bridges, and of certain personal property, the property of said Ralph B. Bridges, to-wit:

Allis-Chalmers Tractor, Model D21, Serial No. 2714, Mtr. No. 3D-04490

you make, or cause to be made, the sum of $ 2,151.28, principal, the further sum of $ 31.35, interest up to the 14th day of March, 1974, also the further sums of Thirty Two and 50/100 for costs; one Zac A. Crittenden, Jr. having this day made oath before the undersigned, for the purpose of foreclosing a lien on said property, deposing and saying under oath that said sums were due and owing to him from said Ralph B. Bridges.

Have you the several sums of money at the Superior Court of Randolph County, Georgia, to be held on the 6th day of May, 1973, to render to the said Zac A. Crittenden, Jr. the principal, interest, other amounts, if any, and costs as aforesaid. And have you then and there this writ.

Witness the Honorable W. I. Geer, Judge of said court, this 14th day of March, 1974.

s/ Wynelle P. Wood
Clerk, Superior Court of Randolph County, Ga.

(SEAL)

EXHIBIT C

IN THE SUPERIOR COURT

OF RANDOLPH COUNTY, GEORGIA

ZAC A. CRITTENDEN, JR.
D/B/A CRITTENDEN TRACTOR COMPANY

Plaintiff

V.

RALPH B. BRIDGES

Defendant

Mechanic's and Bailee's

Lien Foreclosure

GEORGIA, RANDOLPH COUNTY
CLERK'S OFFICE, SUPERIOR COURT
FILED IN OFFICE THIS
14 DAY OF March, 1974
CLERK

A. DELBERT BOWEN
ATTORNEY AT LAW
CUTHBERT, GEORGIA

GEORGIA, RANDOLPH COUNTY

I have this day levied the within fi. fa. on property of defendant in fi. fa. as follows:

Allis-Chalmers Tractor Model D21, Serioal No. 2714
Mtr. No. 3D-04490

This 14 day of March, 1974.

T. E. Faircloth, Sheriff
Randolph County, Georgia

EXHIBIT D

STATE OF GEORGIA

COUNTY OF RANDOLPH

I, Wynelle P. Wood, Clerk of the Superior Court of Randolph County, Georgia, do hereby certify that I have compared the attached and foregoing copies of the following, to-wit:

Affidavit of Zac A. Crittenden, Jr. for Foreclosure of Lien on Personal Property, dated March 14, 1974;

Fi. Fa. or Execution issued against property of Ralph B. Bridges, dated March 14, 1974;

Return of J. T. Faircloth, Deputy Sheriff of Randolph County, Georgia, upon the aforesaid Fi. Fa. or execution, said return being dated March 14, 1974;

with the original record thereof, now remaining in this office, and the same is a true and correct copy or transcript thereof and of the whole of such record.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 30th day of May, 1975.

[SEAL]

/s/ Wynelle P. Wood
Clerk
Superior Court of
Randolph County, Georgia

Columbus, Georgia

July 8, 1975

I, HOWELL HOLLIS, III, certify that I am counsel for the Defendant in the foregoing case, Zac A. Crittenden, Jr., doing business as Crittenden Tractor Company, and that I have this day served the foregoing Notice and Motion for Summary Judgment on the Plaintiff by placing a copy thereof in a sealed wrapper, with postage prepaid, addressed to the Honorable Edgar W. Ennis, Jr., Assistant U.S. Attorney, P.O. Box U, Macon, Georgia 31202, the attorney for the Plaintiff, and depositing it in a United States mailbox.

/s/ Howell Hollis, III

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

[Caption Omitted]

[Filed July 24, 1975]

PLAINTIFF'S INTERROGATORIES
TO DEFENDANT

TO: ZAC A. CRITTENDEN, JR., Defendant

The plaintiff requests that the defendant answer, under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

—1—

Attached to defendant's affidavit in support of his Motion for Summary Judgment was Exhibit A, a ledger or account sheet referred to in the affidavit as a "shop record". Entries begin on September 26, 1972 and end on December 21, 1973. During that period, was the tractor always in the defendant's possession?

—2—

(a) If the answer to question 1 is "yes", please explain why repairs continued to be made on the tractor over a period of over a year with no payments being made by Mr. Bridges.

(b) If the answer to question 1 is "no", please refer to this Exhibit A and provide us the dates Mr. Bridges delivered the tractor for repairs and the dates defendant returned the tractor to Mr. Bridges during the period covered by that Exhibit.

—3—

If the answer to question 1 is "no", did defendant ever file a claim of lien within 90 days after the work was

done in the office of the Clerk of the Superior Court of the county where the owner resides as provided in Section 67-2003, Ga. Code Ann.?

—4—

At the time defendant took action to levy on his lien, did he know that Ralph Bridges had filed his petition in bankruptcy in the United States District Court for the Middle District of Georgia on February 4, 1974?

RONALD T. KNIGHT
United States Attorney

By /s/ H. Palmer Carr, Jr.
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States mail a copy of same in a properly addressed and franked envelope.

This 23 day of July, 1975.

/s/ H. Palmer Carr, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

[Caption Omitted]

DEFENDANT'S ANSWERS TO INTERROGATORIES

Now comes Zac A. Crittenden, Jr., defendant in the above styled action and answers the interrogatories served upon him on the 23rd day of July, 1975, pursuant to Rule 33 of the Federal Rules of Civil Procedure, and answers each question separately as follows:

1.

No, the tractor was not always in defendant's possession.

2.

(a) (Question not applicable)

(b) No records were kept as to the exact dates of delivery of the tractor to defendant for repair, nor exact dates the tractor was returned to Bridges following repairs. However, based on defendant's operating experience and custom, the following dates are a close estimate of the actual dates in relation to the dates shown on Exhibit A:

Date on Exh. A.	Date of Delivery To Defendant (On or About)	Date returned To Bridges (On or About)
11-29-72	11-29-72	11-29-72
4- 5-73	4- 5-73	4- 6-73
4-12-73 & 4-16-73	4-12-73 & 4-16-73	4-17-73
5-22-73	5-22-73	5-30-73
6-19-73	6-19-73	6-21-73
7-10-73	7-10-73	7-18-73

The subject tractor has been continuously in possession of the defendant since on or about December 21, 1973.

3.

No.

4.

No. Defendant had no knowledge whatsoever that Ralph Bridges had filed a petition in bankruptcy, nor that he intended to file such a petition.

This 21st day of August, 1975.

/s/ Zac A. Crittenden, Jr.
ZAC A. CRITTENDEN, JR.

Sworn to and subscribed before
me, this 21st day of August, 1975.

/s/ Sandra S. Haynes
Notary Public
Randolph Co., Ga.

[SEAL]

CERTIFICATE OF SERVICE

Columbus Georgia

September —, 1975

I, HOWELL HOLLIS III, certify that I am of counsel for the Defendant in the foregoing case, and that I have this day served the foregoing Answers to Interrogatories on the Plaintiff by placing a copy thereof in a sealed wrapper, with postage prepaid, addressed to Mr. Edgar W. Ennis, Jr., Assistant U.S. Attorney, P.O. Box U, Macon, Georgia 31202, the attorney for plaintiff United States of America, and depositing it in a United States mailbox.

/s/ Howell Hollis III
Of Counsel for Defendant

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

[Caption Omitted]

JUDGMENT

Defendant in this action having filed a motion for summary judgment on July 8, 1975, and the Court having rendered a decision on September 25, 1975 granting said motion and denying all relief requested by the Plaintiff, it is

ORDERED AND ADJUDGED that Defendant's motion for summary judgment is granted; that Plaintiff take nothing; and that all prayers of Plaintiff's Complaint are denied.

This 25th day of September, 1975.

WALTER F. DOYLE
Clerk of Court

By /s/ H. Okay Parker
Deputy Clerk

[SEAL]

JUDGMENT ENTERED OF RECORD
SEPTEMBER 25, 1975.

This is to certify that I have this day mailed a copy of this document to all attorneys of record & to all parties who are not represented by an attorney.

This 25 day of Sept., 1975.

WALTER F. DOYLE
Clerk

By /s/ H. Okay Parker
Deputy Clerk

SUPREME COURT OF THE UNITED STATES

No. 77-1644

UNITED STATES, PETITIONER

v.

ZAC A. CRITTENDEN, JR.
dba Crittenden Tractor Company

ORDER ALLOWING CERTIORARI. Filed October 2, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is set for oral argument in tandem with *United States* v. *Kimbell Foods, Inc.* No. 77-1359.

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No. 77-1644

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

ZAC A. CRITTENDEN, JR.
d/b/a CRITTENDEN TRACTOR COMPANY

RESPONSE OF ZAC A. CRITTENDEN, JR. d/b/a CRITTENDEN TRACTOR COMPANY TO PETITION FOR WRIT OF CERTIORARI

JOE C. FREEMAN, JR.
HOWELL HOLLIS III
FREEMAN & HAWKINS
618 Fulton Federal Building
Atlanta, Georgia 30303

Of Counsel for Defendant,
ZAC A. CRITTENDEN, JR.,
d/b/a CRITTENDEN TRACTOR
COMPANY

No. 77-1644

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

UNITED STATES OF AMERICA, PETITIONER

V.

ZAC A. CRITTENDEN, JR.
d/b/a CRITTENDEN TRACTOR COMPANY

RESPONSE OF ZAC A. CRITTENDEN, JR.
d/b/a CRITTENDEN TRACTOR COMPANY
TO PETITION FOR WRIT OF CERTIORARI

I.

ARGUMENT AND CITATION OF AUTHORITY

A.

THE GRANTING OF THE WRIT OF CERTIORARI IN A DIFFERENT CASE IS NO REASON FOR GRANTING IT IN THE PRESENT ACTION.

The United States of America argues that the granting of Certiorari in Kimbell Foods, Inc. v. Republican National Bank, 557

F.2d 491 (C.A. 5) provides a reason for granting Certiorari in this case. Crittenden was not a party to Kimbell, supra, and certainly not apprised of the reason that the Supreme Court of the United States granted Certiorari. However, the Kimbell case involves different issues from those presented in this case.

In Kimbell, the Court applied Texas law. In the instant case, the Court applied federal common law, albeit modeled after the Uniform Commercial Code. In Kimbell, the Court rejected the "choateness" aspect of the "first in time, first in right priority rule, but nevertheless, awarded priority to the lienor, who was "first in time;" in this case, the Court disreguarded both aspects of the so-called "choate lien" test. In Kimbell, the contest was between two commercial lenders (the SBA being the asignee of one such lender); in this case the contest is between the FHA and a mechanic, an individual whose special status is recognized in the Tax Lien Act.

Therefore, the granting of Certiorari in Kimbell should not be considered as a reason for granting Certiorari in this case. Although both cases involve the "first in time, first in right" rule, there is no other factual similarity between the cases and no identity of issues presented.

The only rationale presented by the Petition for Writ of Certiorari is that the Court granted the Writ in Kimbell; Crittenden submits that such reasoning is insufficient and does not comport with Rule 19 of this Court.

B.

THE DECISION OF THE COURT OF APPEALS IS CORRECT.

The Court of Appeals, applying federal common law, determined that a possessory mechanic's lien is superior to an FHA security interest, perfected pursuant to the Uniform Commercial Code to the extent that the mechanic continuously possesses collateral. In so deciding, the Court of Appeals simply placed the FHA in the same position that a non-governmental lender would be placed in a forum which has adopted the uniform version of the Uniform Commercial Code (UCC §9-310). As Judge Goldberg observed in this case:

> Super priority for mechanics has been embraced by Congress in the Tax Lien Act, 26 U.S.C. §6323(b)(5), and by the overwhelming majority of states in their adoption of the model version of U.C.C. §9-310. The limited priority of the mechanic's lien is not new to our jurisprudence, and even in the complexity of our modern commercial society, it is a doctrine of respectful antiquity and one not to be disguarded facilely and without real justification by the evolving common law. 563 F.2d at 689.

C.

CONCLUSION

The decision of the Court of Appeals affirming Judgment in favor of Crittenden in the amount of $543.81 is imminently correct. For the foregoing reasons, the Writ of Certiorari should not be granted.

Respectfully submitted,

FREEMAN & HAWKINS

Joe C. Freeman Jr

JOE C. FREEMAN, JR.

Howell Hollis III

HOWELL HOLLIS III

CERTIFICATE OF SERVICE

This is to certify that I have this date served Wade H. McCree, Jr., Solicitor General, with a copy of the within and foregoing Response of Zac A. Crittenden, Jr., d/b/a Crittenden Tractor Company to Petition for Writ of Certiorari by depositing same in the United States Mails in a properly addressed envelope addressed to Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D. C. 25030, with sufficient postate affixed thereon.

This 2nd day of August, 1978.

FREEMAN & HAWKINS

HOWELL HOLLIS III

Attorney for Defendant,
ZAC A. CRITTENDEN,
d/b/a CRITTENDEN TRACTOR
COMPANY

Supreme Court, U. S.
FILED
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No. 77-1644

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

ZAC A. CRITTENDEN, JR.,
d/b/a CRITTENDEN TRACTOR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

FRANK H. EASTERBROOK
Deputy Solicitor General

MARION L. JETTON
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Summary of argument	8
Argument	12
I. The choate lien doctrine should be applied in this case	12
II. The government's lien has priority because it was first in time	13
A. The application of the first in time rule to federal contractual liens is settled law	14
B. There is no sufficient reason to abandon the first in time rule	18
C. The court of appeals' decision in this case illustrates the difficulties in changing priority rules by judicial decision	25
Conclusion	32

CITATIONS

Cases:

Bond v. *Dudley*, 244 Ark. 568, 426 S.W. 2d 780	27
Bryce Hospital Credit Union, Inc. v. *Warrior Dodge, Inc.*, 50 Ala. App. 15, 276 So.2d 602, cert. denied, 290 Ala. 362, 276 So.2d 607	27

Cases—Continued

	Page
Burnet v. *Coronado Oil & Gas Co.*, 285 U.S. 393	26
Checkered Flag Motor Car Co. v. *Grulke*, 209 Va. 427, 164 S.E.2d 660	27
Chicago Title Insurance Co. v. *Sherred Village Associates*, 568 F.2d 217, petition for cert. pending *sub nom. Hercoform Inc.* v. *Chicago Title Insurance Co.* (No. 77-1611)	17, 31
Clearfield Trust Co. v. *United States*, 318 U.S. 363	31
Fitzsimmons v. *Ogden*, 11 U.S. (7 Cranch) 2	14
Freuhauf Corp. v. *Huntington Moving and Storage Co.*, 217 S.E.2d 907	27
Galveston R.R. v. *Cowdrey*, 78 U.S. 459	15, 16, 21
GMC Superior Trucks, Inc. v. *Irving Bank & Trust Co.*, 463 S.W.2d 274	27
Howard v. *Railway Co.*, 101 U.S. 837	14-15
Kimbell Foods, Inc. v. *Republic National Bank*, 557 F.2d 491, cert. granted *sub nom. United States* v. *Kimbell Foods, Inc.*, No. 77-1359 (May 15, 1978)	12
Monell v. *Department of Social Services*, No. 75-1914 (June 6, 1978)	18
Municipal Equipment Co. v. *Butch & Son Deep Rock*, 185 N.W.2d 756	27
National Bank v. *Whitney*, 103 U.S. 99	17
Neslin v. *Wells*, 104 U.S. 428	16
Pennington v. *Alexander*, 103 Ill. App. 2d 145, 242 N.E.2d 788	27
Portneuf-Marsh Co. v. *Brown*, 274 U.S. 630	15

Cases—Continued

	Page
Rankin v. *Scott*, 25 U.S. (12 Wheat.) 177	9, 13, 14, 16
T. H. Rogers Lumber Co. v. *Apel*, 468 F.2d 14	17
Toledo, D. & B. R.R. v. *Hamilton*, 134 U.S. 296	14, 21
United States v. *California-Oregon Plywood, Inc.*, 527 F.2d 687	17
United States v. *City of New Britain*, 347 U.S. 81	12, 15
United States v. *General Douglas MacArthur Senior Village, Inc.*, 470 F.2d 675, cert. denied, 412 U.S. 922	17
United States v. *Hext*, 444 F.2d 804	26
United States v. *Kimbell Foods, Inc.*, cert. granted, No. 77-1359 (May 15, 1978)	8
United States v. *Latrobe Construction Co.*, 246 F.2d 357, cert. denied, 355 U.S. 890	17
United States v. *Pioneer American Insurance Co.*, 374 U.S. 84	13
United States v. *Ringwood Iron Mines, Inc.*, 251 F.2d 145	17
United States v. *Security Trust & Savings Bank*, 340 U.S. 47	12
White Motor Credit Corp. v. *Sapp Bros. Truck Plaza, Inc.*, 197 Neb. 421, 249 N.W.2d 489	27
Willow Creek Lumber Co. v. *Porter County Plumbing & Heating, Inc.*, 572 F.2d 588	17

Statutes and regulations: Page

Bankruptcy Act, 11 U.S.C. 104 14
Consolidated Farm and Rural Development Act, 86 Stat. 657 2
Consolidated Farmers Home Administration Act of 1961, 7 U.S.C. 1921 *et seq.*... 2
7 U.S.C. 1922 2
7 U.S.C. 1929(a) .....
7 U.S.C. 1941(a)(4) 19
7 U.S.C. 1983(a) 19
7 U.S.C. 1983(c), as amended by Pub. L. No. 95-334, Section 123, 92 Stat. 428 19

Federal Tax Lien Act of 1966:
26 U.S.C. 6323 ..... 17, 18
26 U.S.C. 6323(b)(5) 30

28 U.S.C. 1345 4
31 U.S.C. 191 13
Ga. Code Ann.:
§ 109A-9-310 (1973) 27, 28
§ 67-1701(7) (1973) 27
§ 67-2003 (1967) 28
§ 67-2003 (Supp. 1977) 28

Model U.C.C. § 9-310 (1972 ed.) .....*passim*
7 C.F.R. 1801.2(g) 19
7 C.F.R. 1801.3(a)(2) 19

Miscellaneous:
Annotation, 69 A.L.R. 3d 1162 (1976).... 27
3A *W. Collier on Bankruptcy* (14th ed. 1975) 14
2 G. Gilmore, *Security Interests in Personal Property* (1965) 22

Miscellaneous—Continued Page

2 L. Jones, *Chattel Mortgages and Conditional Sales* (6th ed. 1933 and Supp.).. 22
Restatement of Security (1941) 22
1 *J. Story's Equity Jurisprudence* (14th ed. 1918) 14
Whiteside, *Priorities Between Chattel Mortgagee or Conditional Seller and Subsequent Lienors*, 10 Cornell L.Q. 331 (1975) 22

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1644

UNITED STATES OF AMERICA, PETITIONER

v.

ZAC A. CRITTENDEN, JR.,
d/b/a CRITTENDEN TRACTOR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 563 F.2d 678. The opinion of the district court (Pet. App. 40a-41a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37a) was entered on November 21, 1977. A petition for rehearing was denied on February 6, 1978 (Pet.

App. 39a). On April 28, 1978, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to and including July 6, 1978. The petition was filed May 18, 1978, and was granted on October 2, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1245(1).

QUESTION PRESENTED

Whether a private lien that arises after a federal lien had attached may take precedence over the federal lien under principles giving the private lien a form of "super-priority."

STATEMENT

1. In December 1970 Ralph B. Bridges obtained an operating loan from the Farmers Home Administration (FHA) of the United States Department of Agriculture (A. 4-5). The loan was authorized by the Consolidated Farmers Home Administration Act of 1961,[1] 7 U.S.C. 1921 *et seq.*, under which farmers who are "unable to obtain sufficient credit elsewhere to finance their actual needs at reasonable rates and terms" (7 U.S.C. 1922) may obtain federal financial assistance (Pet. App. 3a). To secure this loan, and any additional loans made to him by the FHA, Bridges executed a security agreement granting FHA a security interest in his crops and farm equipment. The FHA perfected this security interest by filing a

[1] The Act has been redesignated the Consolidated Farm and Rural Development Act. See 86 Stat. 657.

financing statement with the appropriate officials in Terrell County and Randolph County, Georgia (A. 5).

The FHA made a second loan to Bridges on August 20, 1971, and a third loan on February 2, 1972 (A. 4, 7). On February 2, 1972, Bridges executed a new security agreement to reflect changes in collateral (A. 5, 7-10). This agreement showed outstanding loans totalling $23,500 in principal amount.[2] It was perfected on February 2, 1972, by filing a financing statement with appropriate Terrell and Randolph County officials (A. 5, 11-12). The collateral listed in the second security agreement included a 1968 Allis Chalmers Diesel 21 tractor, serial number 2417 (A. 5, 8).

More than nine months after the second financing statement was filed, Bridges took his tractor to respondent for repairs and began to accumulate unpaid repair bills (A. 21). By July 1973, Bridges' bill was $1,607.47 (*ibid.*). On December 21, 1973 Bridges again took the tractor to respondent for repairs that raised his account by $543.81, to $2,151.28 (A. 21, 29). Respondent retained possession of the tractor while awaiting payment (A. 29). Respondent did not file a formal lien against the tractor.[3]

On February 4, 1974, Bridges filed a petition in bankruptcy in the United States District Court for the Middle District of Georgia (Pet. App. 4a). On

[2] The agreement listed the August 20, 1971, loan for $1,600 and the February 2, 1972, loan for $21,900 (A. 7).

[3] Compare A. 27-28 (interrogatory 3) with A. 29 (answer 3).

March 14, 1974, respondent foreclosed on his repairman's lien by having the sheriff levy on the tractor (A. 5, 14, 23-24). Respondent remained in possession as bailee (A. 5, 13-14). Bridges was discharged in bankruptcy on September 26, 1974 (Pet. App. 4a).

2. The United States began this action on May 1, 1975, by filing a complaint against respondent to obtain possession of the tractor (see 28 U.S.C. 1345) (A. 4-5).[4] The complaint recited that the United States first learned of respondent's levy when Bridges filed his petition in bankruptcy and the FHA attempted to locate its collateral (A. 5). The complaint contended that the United States was entitled to immediate possession because Bridges had defaulted under the terms of his loan agreement.[5] The complaint also asserted that the United States had an interest in the tractor prior and superior to respondent's, and that the unpaid balance on Bridges' FHA loan account was in excess of the value ($5,000) of the tractor (A. 5-6).

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[4] After the court of appeals' judgment was entered in this case and the case was remanded to the district court, the district court granted a motion for leave to sell the tractor (A. 2). This case therefore will affect the disposition of the proceeds of that sale.

[5] Bridges agreed not to encumber the collateral or permit the collateral to be levied on (A. 9), and he also agreed that failure to observe this agreement would constitute default (A. 10). Bankruptcy of the debtor also constitutes default (*ibid.*).

The district court granted respondent's motion for summary judgment (Pet. App. 40a-41a). It held that the United States did not have a perfected security interest in the tractor because this equipment was not adequately described in the financing statement[6] (*ibid.*). Even if the description were adequate, the court stated, petitioner "nevertheless had a special mechanic's lien against the property which has priority over" the government's interest "regardless of whether 'Georgia' law or 'Federal' law is applied"; alternatively, the court concluded, respondent had an "equitable lien" that the court would acknowledge to prevent "unjust enrichment of [the United States] at the expense of [respondent]" (Pet. App. 41a).

3. The court of appeals affirmed in part. It held that the financing statement's description of the collateral was adequate (Pet. App. 5a-12a), but it concluded that the federal lien was not entitled to priority over respondent's lien for the work done when the tractor was last in respondent's possession (Pet. App. 12a-36a).

The court of appeals acknowledged that federal law governs the rights and liabilities of parties in controversies arising from FHA loan transactions (Pet. App. 12a), but it declined to follow the established federal rule that the lien "first in time is the first in right" (Pet. App. 13a-25a). In so doing, it also rejected the rule that, in order to compete with a federal lien to be first in time, a private lien must

---

[6] The financing statement filed with county officials referred to "farm equipment" (A. 11-12).

be "choate" (Pet. App. 13a n.11). The court recognized that respondent's lien could not be first in time under any rationale (Pet. App. 19a n.13) but decided to accord it priority nonetheless, concluding that federal courts should follow the lead of the Federal Tax Lien Act of 1966 in according a "super-priority" to certain repairmen's possessory liens (Pet. App. 15a-22a).[7] It justified this approach as "consistent with accepted commercial principles" in preventing a creditor from "claim[ing] improved personal property at the expense of the repairman" and obtaining "an unfair windfall" (Pet. App. 22a-23a). It also viewed its ruling as protecting " 'the small businessman who operates informally, depending upon an oral agreement and his possession to enforce his claim' " (*ibid.*). It discounted the federal interest because "FHA was engaged in local moneylending transactions" (Pet. App. 25a).

The court of appeals then fashioned a federal rule for this case (Pet. App. 25a-35a). It first considered whether to adopt state law or the Uniform Commercial Code (U.C.C.) as the federal rule. It observed that Georgia law may not accord super-priority to respondent's lien (Pet. App. 26a & n.17). It ultimately selected the U.C.C. rule because the U.C.C.

[7] The court of appeals refers to repairmen's liens for work done on chattels in the repairman's possession as "mechanics' liens" (Pet. App. 13a n.10). We will refer to liens on chattels for repair services as "repairmen's liens" to distinguish them from nonpossessory mechanic's and materialmen's liens for work done and materials furnished on real property.

"embodies rules of nationwide applicability" (Pet. App. 28a-29a), and because the Fifth Circuit previously had said that in fashioning the federal rule for FHA lending programs, it would " 'be guided by the principles set forth in Article 9' " of the U.C.C. (Pet. App. 29a). The court observed that in this case the U.C.C. was more favorable than state law to respondent, and therefore "no reasonable expectation of the mechanic would be thwarted by adopting" the U.C.C. rule (Pet. App. 28a).

The court then proceeded to apply Section 9-310 of the U.C.C. That section provides priority over a perfected security interest to liens for services or materials furnished with respect to goods in the possession of the lienholder, except that the perfected security interest has priority if the lien for services or materials is statutory and the statute expressly provides that the earlier-perfected lien retains priority.[8]

The court followed the U.C.C. in looking to Georgia law to determine whether that State's law recognizes respondent's lien. It determined that the lien is valid under state statutory law and that the U.C.C. therefore gives respondent priority at least for the charges

[8] Section 9-310 of the Model U.C.C. (1972 ed.) provides:

> When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

incurred when the tractor was last in respondent's possession (Pet. App. 31a).[9] The court then turned to the question of the priority of repair charges incurred when the tractor was previously in respondent's possession. Because it was unable to find precedent on this point decided under the U.C.C., the court turned to the provision of the Federal Tax Lien Act; it concluded, on the authority of that Act's treatment of possessory liens, that respondent's claim for earlier repairs is junior to the federal lien (Pet. App. 23a-35a).

SUMMARY OF ARGUMENT

I

The choate lien doctrine should be applied to federal contractual liens for the reasons set forth in our brief in *United States* v. *Kimbell Foods, Inc.*, cert. granted, No. 77-1359 (May 15, 1978). If the doctrine is applied in this case, the government's lien has priority. Bridges' tractor was not delivered to respondent for repairs until nine months after the government's lien was recorded, and therefore respondent's lien could not have been choate when the government's lien was perfected by filing. If the Court agrees with our arguments in *Kimbell*, then it should reverse the judgment in this case.

---

[9] The court decided that it would not follow the exception contained in Section 9-310 providing that the perfected security interest will nonetheless have priority if state statutory law so provides. Pet. App. 31a-32a n.20.

II

A. The court of appeals also rejected a more fundamental doctrine in refusing to recognize that the lien first in time is first in right. The choateness rule was developed to determine whether federal or private liens are first in time. But the underlying doctrine, that the lien first in time is first in right, is the fundamental common law rule. This Court has characterized it as a "principle * * * believed to be universal" (*Rankin* v. *Scott*, 25 U.S. (12 Wheat.) 177, 179 (1827)) and has applied it to establish priorities between federal and private liens, as well as among private lienholders.

Application of the rule allows a lender to assess his risks. The Court has regarded it as a matter of fundamental fairness to the prior lienholder who expects, in the absence of a contrary statute or agreement among the affected parties, that each successive interest will be subject to all prior interests. Although Congress undoubtedly could alter this long-established rule, alterations of this type, which affect the business expectations of the commercial community, are properly a subject of legislative rather than judicial action. The court of appeals' reasons for undertaking a judicial revision are insufficient.

B. The first two reasons given by the court of appeals—that the policies of the Federal Tax Lien Act of 1966 support abandoning the established rule as to federal contractual liens, and that the federal government should be treated just like any other commercial lender—were advanced by the court in *Kim-*

bell as well. But, as we stated in our brief in that case, Congress simply did not address the policies affecting federal contractual liens when it legislated with respect to tax liens. Moreover, the federal government, as a lender of last resort, cannot be characterized as merely another commercial lender.

The court of appeals also relied on its conclusion that a repairman's lien is special and that it is unfair for the first lienor to have priority over it. But the first in time rule does not mean that the repairman is without protection. He or the debtor may ask the secured party to release some of the collateral, or the repairman can require the debtor to advance the funds for repairs or provide some other security for work done on credit.

Further, the treatment of repairmen under the first in time doctrine is not so different from the treatment of other creditors in position of equal equity. The mere fact that the repairman possesses the tractor should not distinguish him from the grocer who provides food, or supplier who provides seed. Each contributes to the operation of the farm, increases the prospects of the FHA regaining the funds it has loaned, and thus benefits the FHA. No one has suggested that these suppliers should have a super-priority on this basis. Indeed, this Court has rejected similar arguments by improvers or conservers of property claiming a super-priority for their liens.

The American Law Institute and a number of commentators agree that the equities do not require a super-priority for repairmen; the applicable Restate-

ment adopts the rule that the secured interest retains priority unless the secured creditor agrees to subordinate his interest. And a number of states continue to follow this rule.

C. The first in time rule has the virtue of certainty and simplicity. The Fifth Circuit's course in developing a new common law, by contrast, is idiosyncratic and unpredictable. In reaching its result in this case, it borrowed from state law, the Model U.C.C. and the Tax Lien Act. No similar rule can be found in any statute or principle of common law, and no one can predict what the result will be in another case with slightly different facts. The FHA and the other lending agencies of the United States have no idea what rule will be applied to future cases.

Our point is not that the Fifth Circuit's formulation is worse than any other reformulation, but that there is no suitable body of law, other than the first in time doctrine, from which the courts can draw a uniform rule. Only the first in time rule can be administered in an efficient and equitable way, in the absence of additional guidance from Congress. The appropriate body to modify that rule is the Congress.

ARGUMENT

I

THE CHOATE LIEN DOCTRINE SHOULD BE APPLIED IN THIS CASE

As the court of appeals recognized (Pet. App. 13a n.11), if the choate lien doctrine—which requires a private lien to be choate before it can complete with a federal lien for priority—applies to this case, then the government's lien has priority. Bridges' tractor was not delivered to respondent for repairs until nine months after the government's lien was recorded, so "the identity of the lienor, the property subject to the lien, and the amount of the lien" (*United States* v. *City of New Britain*, 347 U.S. 81, 84 (1954); see also *United States* v. *Security Trust & Savings Bank*, 340 U.S. 47, 50-51 (1950)) could not have been established, and respondent's lien could not have been choate, at the time the government's lien was perfected by filing.

The court of appeals stated that it did not apply the choateness doctrine here because it had held, in *Kimbell Foods, Inc.* v. *Republic National Bank*, 557 F.2d 491 (5th Cir. 1977), cert. granted *sub nom. United States* v. *Kimbell Foods, Inc.*, No. 77-1359 (May 15, 1978), that the doctrine should be abandoned. We have argued in *Kimbell* that the choateness rule should be retained. The arguments we have made there also show that the choate lien doctrine should be applied to this case.[10] The government's lien accordingly should have been accorded priority.[11] If the Court agrees with our arguments in *Kimbell*, then it should reverse the judgment in this case.

[10] We are supplying respondent with a copy of our brief in *Kimbell*.

II

THE GOVERNMENT'S LIEN HAS PRIORITY BECAUSE IT WAS FIRST IN TIME

The court of appeals in this case rejected a more fundamental doctrine, of which the choate lien rule is only an application. It refused to recognize that the lien first in time is first in right. This Court originally derived the choateness doctrine from the implementation of the first-in-time rule in the insolvency statute, 31 U.S.C. 191; the choateness doctrine was employed to determine which liens are first in time.[12] The underlying doctrine—that the lien first in time is first in right—is a rule of general applicability that this Court characterized as the fundamental common law rule. See, *e.g.*, *United States* v. *Pioneer American Insurance Co.*, 374 U.S. 84, 87 (1963); *Rankin* v. *Scott*, 25 U.S. (12 Wheat.) 177, 179 (1827). Even if this Court should hold in *Kimbell Foods* that the choate lien doctrine should not be applied to contractual liens, it should continue to enforce the funda-

[11] The court of appeals recognized that "if the choateness doctrine applies here, FHA's security interest would be superior to Crittenden's lien" (Pet. App. 14a n.11).

[12] We discussed the development of the choate lien doctrine at pages 17-21 of our brief in *Kimbell*.

mental precept that the lien first in time is first in right.[13]

A. The application of the first in time rule to federal contractual liens is settled law

In 1827, when this Court decided *Rankin* v. *Scott*, *supra*, a case involving the relative priority of two private judgment liens, the first in time rule was already a settled principle of law. As Mr. Chief Justice Marshall observed, "[t]he principle is believed to be universal that a prior [valid] lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds." [14] 25 U.S. (12 Wheat.) at 179. The rule has been followed, at common law, ever since.[15] When this Court addressed the issue of tax

[13] The relative priorities of the government and respondent were not affected by Bridges' bankruptcy. Assets of the bankrupt in the trustee's hands are subject to liens in favor of third persons at the date of bankruptcy, and priority rights given by the Bankruptcy Act (11 U.S.C. 104) do not affect valid liens. See 3A *W. Collier on Bankruptcy* § 64.02[2] & n.10 (14th ed. 1975). The insolvency statute, 31 U.S.C. 191, also had no application at the time the government brought this action, because Bridges' discharge in bankruptcy rendered him solvent once again.

[14] The rule, expressed as the maxim *qui prior est in tempore, potior est in jure*, was applied in equity as well as at law. *Fitzsimmons* v. *Ogden*, 11 U.S. (7 Cranch) 2, 17 (1812) (dictum); *Toledo, D. & B. R.R.* v. *Hamilton*, 134 U.S. 296, 298-301 (1890); 1 *J. Story's Equity Jurisprudence* § 68 (14th ed. 1918).

[15] See, *e.g.*, *Toledo, D. & B. R.R.* v. *Hamilton*, 134 U.S. 296, 298-301 (1890) (giving recorded mortgage on railroad lands that was prior in time priority over mechanic's lien for work done in constructing the railroad); *Howard* v. *Railway Co.*,

lien priorities in 1954 in *United States* v. *City of New Britain*, *supra*, 347 U.S. at 85-86, it applied the first in time doctrine, reasoning that "[w]e think Congress had this cardinal rule in mind" because it had not enacted any different schedule of priorities for tax liens. The Court quoted *Rankin* with approval and observed that the first in time rule still "is widely accepted and applied in the absence of legislation to the contrary." In *United States* v. *Pioneer American Insurance Co.*, *supra*, 374 U.S. at 87, the Court again characterized the first in time doctrine as "the common-law rule," applying it to determine the priority of a federal tax lien.

Application of the first in time rule allows a lender to assess his risks. Only prior liens can be known with certainty, and if subsequent liens could achieve priority the certainty necessary in money transactions would be undermined. Subsequent lenders can discover existing interests and, if they seek a priority higher than that provided by the first in time rule, can negotiate with existing secured parties. The rule never prevents consensual orderings of priorities; it simply sets a starting point from which bargaining

101 U.S. 837, 844-849 (1879) (as between two judgment liens, giving priority to lien based on earlier entered judgment); *Galveston R.R.* v. *Cowdrey*, 78 U.S. (11 Wall.) 459, 475, 476, 480-482 (1870) (denying priority to mechanic who claimed priority over earlier mortgages by virtue of benefits conferred on railroad). See also *Portneuf-Marsh Co.* v. *Brown*, 274 U.S. 630, 636-640 (1927) (noting that "[u]sually liens prior in time are prior in equity" but concluding that statutes established priority in that case).

can proceed. And because it sets a clear starting point, the first in time rule holds to a minimum the costs associated with bargaining and with the resolution of disputes about lien priorities.

This Court also has regarded the rule as a matter of fundamental fairness to the prior lienholder. In the absence of a statute reordering priorities, the lienholder expects that subsequent lienors will obtain only so much of an interest as remains in the debtor to convey or encumber. Each successive interest is assumed to be taken subject to all prior interests, and upsetting this expectation would "work the greatest injustice." *Galveston R.R.* v. *Cowdrey*, 78 U.S. (11 Wall.) 459, 475-476 (1870). See also, *e.g.*, *Neslin* v. *Wells*, 104 U.S. 428, 440 (1881); *Rankin* v. *Scott*, *supra*, 25 U.S. (12 Wheat.) at 178.

The rule has been followed for so long that expectations—indeed, entire systems of lending—have been built on it. Congress undoubtedly could alter the first in time rule, as the states have modified it in some respects by adopting the Uniform Commercial Code. But alterations of this sort, we submit, are properly a subject of legislative rather than judicial action. The reasons advanced by the court of appeals are insufficient to justify judicial revision of a centuries-old rule. "Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of the commercial community depends, in a great degree, upon the stability of the rules by

which its transactions are governed." *National Bank* v. *Whitney*, 103 U.S. 99, 102 (1880).

Not only the decisions of this Court but also those of the great majority of the courts of appeals [16] recognize the application of the first in time rule to federal contractual liens. The showing that can justify judicial alterations of established rules—a demonstration that the rule was a misunderstanding of

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[16] Since enactment of the Tax Lien Act, 26 U.S.C. 6323, the courts of appeals for the First, Second, Seventh and Tenth Circuits have rejected the argument that the Tax Lien Act has any bearing on the priority of federal non-tax liens and have continued to apply the first in time doctrine in conjunction with the choateness doctrine. *Chicago Title Insurance Co.* v. *Sherred Village Associates*, 568 F.2d 217 (1st Cir. 1978), petition for cert. pending *sub nom. Hercoform, Inc.* v. *Chicago Title Insurance Co.* (No. 77-1611); *United States* v. *General Douglas MacArthur Senior Village, Inc.*, 470 F.2d 675 (2d Cir. 1972), cert. denied, 412 U.S. 922 (1973); *Willow Creek Lumber Co.* v. *Porter County Plumbing & Heating, Inc.*, 572 F.2d 588 (7th Cir. 1978); *T. H. Rogers Lumber Co.* v. *Apel*, 468 F.2d 14 (10th Cir. 1972).

Of these cases, *MacArthur Senior Village* directly involved a claim of super-priority, and the Second Circuit refused to accord the non-federal lien the super-priority conferred by state law and recognized by the Tax Lien Statute. It thus followed the earlier refusal of the Third and Eighth Circuits, in cases antedating the Tax Lien Act, to recognize super-priorities over federal contractual liens. See *United States* v. *Ringwood Iron Mines, Inc.*, 251 F.2d 145 (3d Cir. 1958); *United States* v. *Latrobe Construction Co.*, 246 F.2d 357 (8th Cir.), cert. denied, 355 U.S. 890 (1957). *Chicago Title* also involved a claim of extraordinary priority based on state mechanics' lien rules.

But see *United States* v. *California-Oregon Plywood, Inc.*, 527 F.2d 687 (9th Cir. 1975) (according super-priority to state tax liens).

congressional intent, a departure from prior practice, and not the subject of reliance (see *Monell* v. *Department of Social Services*, No. 75-1914 (June 6, 1978), slip op. 35-41)—has not been made here, for the first in time rule has been regarded by common consent as the common law rule and relied on in thousands, perhaps millions, of federal loans.

B. There is no sufficient reason to abandon the first in time rule

The court of appeals advanced three reasons for abandoning the first in time rule. It argued that Congress had altered the rule for tax liens and that the courts should follow that lead for contractual liens (Pet. App. 19a-22a); it contended that application of the first in time rule to a repairman who had improved the value of the property would be unfair (*id.* at 22a-24a); and it concluded that the government should be treated in the same way as private lenders, who now are subject to state laws modifying the first in time rule (*id.* at 25a). None of these reasons is adequate to justify judicial alteration of a rule so firmly established as the first in time doctrine.

The court of appeals' principal argument is based on the Federal Tax Lien Act of 1966, 26 U.S.C. 6323, which the court thought established rules (or at least set a pattern) to be followed in non-tax cases. We have addressed this argument at pages 26-32 and 47-49 of our brief in *Kimbell Foods*. We also addressed, at pages 21-25 and 41-44 of that brief, the court of appeals' argument that the federal government should be treated just like any commercial lender. The same considerations apply in this case, and we rely on them here.[17]

The new argument in this case is the court of appeals' conclusion that repairmen's liens are special, and that it would be unfair for the first lienor to have priority over the subsequent repairmen's lien (Pet. App. 22a-24a). In the court's words (*id.* at 22a-23a; footnote omitted):

> The prior secured creditor's interests are not prejudiced by granting the [repairman's] lien

[17] The FHA, like the agency involved in *Kimbell* (the SBA), makes high-risk loans for reasons of governmental policy, rather than for considerations of profit. FHA loans are available only to farm families unable to obtain credit from other sources at reasonable rates. 7 U.S.C. 1941(a)(4), 1983(a). See 7 C.F.R. 1801.2(g), 1801.3(a)(2). If at any time the borrower is able to obtain a loan from another responsible credit source at reasonable rates and terms, the borrower must "graduate" to this other credit source. 7 U.S.C. 1983(c), as amended by Pub.L. No. 95-334, Section 123, 92 Stat. 428. In other words, the FHA is not an ordinary moneylender. The FHA makes loans from a revolving fund (7 U.S.C. 1929(a)), so that any decrease in the recoveries on its loans either reduces the supply of credit or requires Congress to replenish the fund out of tax receipts. The FHA has experienced serious losses, so that any reduction in the priority accorded to its loans may have a substantial effect on the public fisc. (As of June 30, 1978, the FHA had outstanding operating loans exceeding $1.4 billion. Of these, 17,772 loans worth more than $315 million were delinquent. The Department of Agriculture has other individual farm loan programs in which funds are available only on a showing of special need; 20,723 loans from these funds, totalling more than $1 billion, were delinquent on June 30. The total delinquencies on that date for all special need farm loan programs of the Department under the Consolidated Farm and Rural Development Act were $1,334,561,000.)

> super-priority status because the value of the secured party's collateral is usually enhanced by at least the amount of the lien. * * * Thus in the case at bar FHA should be in the same position after Crittenden's lien attached as it was prior to Crittenden's labors. To allow a creditor to claim improved personal property at the expense of the repairman's interest in such a situation would grant the creditor an unfair windfall.

The court apparently concluded that the first in time rule necessarily is unfair to repairmen. This argument is open to question for several reasons.

a. The first in time rule does not mean that the first lienor has an unchangeable primacy. As the court of appeals recognized, a repairman who desires the greater security available from a more senior lien can "check[] the records and then request[] a release from the FHA and other parties." Pet. App. 35a n. 23. If the FHA were convinced that the repairs would improve the value of the collateral by more than the cost of the repairs, it might release some of the collateral. The first in time rule does no more than ensure that the decision to release or not release "properly rests with the secured party" (*ibid.*). The security agreement in this case, in which the debtor agreed to keep the collateral "free from all liens, encumbrances, security or other interests" except existing liens and landlord's statutory liens (A. 9), represents an attempt to preserve the decision in the hands of the secured party. The court of appeals' approach, on the other hand, transfers effective decision-making

power from the secured party to the debtor and persons who contract with the debtor.

If the first in time rule is applied, repairmen could approach the secured party to seek a partial interest in the collateral sufficient to protect the value of the proposed work. Repairmen could, instead, require debtors to advance the funds for the repairs or to provide other security for work done on credit.[18] Debtors also could approach the secured party, seeking an alteration in the security agreement to give priority to the repairman; the repairman then would perform the repairs on credit secured by the collateral. So long as the repairs increase the value of the collateral, it should be possible to arrange such changes in the security agreements. This is the path that the Court traditionally has required subsequent lienors, including repairmen, to follow if they desire priority over a secured creditor. See *Galveston R.R.* v. *Cowdrey, supra*, 78 U.S. (11 Wall.) at 480-482; *Toledo, D. & B. R.R.* v. *Hamilton*, 134 U.S. 296, 298-301 (1890).[19]

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[18] Payment in advance should not be unduly burdensome for commercial debtors. If the repairs in fact increase the value of the collateral, then the debtors could obtain additional loans with which to pay for the cost of repairs. The security agreement in this case permitted the debtor to ask the FHA to advance funds "for the preservation or protection of the collateral" (A. 9); the advances would be added to the indebtedness on the note at the same rate of interest.

[19] The court of appeals relied on the U.C.C. to show that super-priority for repairmen's liens is the accepted modern rule. The U.C.C. shows nothing of the sort. Section 9-310 of the Model U.C.C. is simply a rule that applies when other state statutes are silent; the draftsmen of the Code did not expect

b. The court of appeals focused on questions of equity between the repairman and the secured party. For the reasons just given, we submit that the first in time rule does not raise the problem that the court perceived. But however that may be, it is pertinent to ask about equitable treatment of similarly situated subsequent lenders. Many people advance funds to debtors. Respondent provided the debtor with some $2,000 in repair work over the course of a year. A grocer or seed supplier might provide the debtor and his family with $2,000 in food or supplies during the same period. Under what standard of equity is the junior claim of a repairman to be preferred over that of the FHA, but the equally junior claim of the grocer or supplier to be treated as inferior? Certainly, in weighing equities, the mere fact that a repairman possesses the tractor while working on it

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Section 9-310 to replace all other rules of priority, and, as the First Circuit explained in *Chicago Title Insurance Co., supra,* the Code did not do so. Rules for the priority of repairmen's and mechanics' liens vary dramatically from state to state; in Georgia, in which the FHA's security agreement was filed, the security interest apparently has priority over repairmen's liens. See note 24, *infra.* Pertinent treatises also express disagreement about the appropriate treatment of repairmen's liens. See, *e.g.,* 2 L. Jones, *Chattel Mortgages and Conditional Sales* §§ 478a-478b (6th ed. 1933 and Supp.); 3 *id.* at § 1126; 2 G. Gilmore, *Security Interests in Personal Property* § 33.3 (1965); Whiteside, *Priorities Between Chattel Mortgagee or Conditional Seller and Subsequent Lienors,* 10 Cornell L.Q. 331, 335-337 (1925). The American Law Institute favors the rule that the secured creditor retains priority over a repairman unless the secured creditor agrees to subordinate his interest. *Restatement of Security* § 76 (1941).

is not a sufficient reason to prefer him over the grocer; the fact that collateral comes into the hands of repairmen but not the grocer's is simply a function of how they provide a service to the debtor.[20]

The court of appeals might respond to this argument by pointing out that the repairman improves the value of the collateral, whereas the grocer does not, and that the repairman's security interest comes out of the value of the improvement. This "new" collateral can be assigned to the repairman, the court might reason, without impairing in any way the position of the secured party.

But this contention, too, seizes on the fortuity that the benefit to the collateral can be traced directly. Suppose that a debtor borrows $2,000 from a bank to pay a repairman. The bank would not be able to claim priority over the FHA, even though the tractor still would have increased in value because of the repairs. Or suppose that the debtor, with $2,000 cash on hand, pays a repairman for repairs but neglects an older bill due to the grocer. The grocer—left out of the arrangement—would have no claim against the tractor. The fact that the debtor in this case paid his grocer rather than his repairman should not affect the extent of security of the FHA.

Many people advance funds without which the debtor loses his livelihood and thus defaults on his loan. Grocers, seed merchants, farm machinery deal-

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[20] While the repairman has a statutory lien and the grocer does not, this difference would not appear significant in the court of appeals' broad consideration of the equities here.

ers, repairmen, and many other merchants may advance goods on credit. All of these merchants contribute to the operation of a debtor's farm. All of these contributions are necessary to the prospect of repayment; after all, the FHA relies principally on the success of the debtor's farm business as a source of repayment and looks to the collateral only in extremis. Under the "equity" rationale of the court of appeals, each of these merchants could claim priority over the FHA, because each contributes something that makes the debtor's payment more likely, and hence inures to the benefit of the FHA. But this approach would turn the law of secured transactions on its head, making the most junior loans the "most important" and hence the ones to be paid first.[21] If, as we think clear, the grocer and seed merchant are not entitled to priority on such a rationale, then the court of appeals' arguments from "equity" are reduced to special pleading on behalf of subsequent creditors who happen to make a peculiarly visible contribution to the FHA's likelihood of recovering on its loans. We submit that a desire to reward one class of creditors whose contributions happen to be visible is not a sufficient reason for a court to upset a rule of priority followed since the founding of the Nation.

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[21] This Court has previously rejected claims that it should reverse the order of priority to favor subsequent improvers (or conservers) of property. See *Galveston R.R.* v. *Cowdrey, supra; Toledo, D. & B. R.R.* v. *Hamilton, supra.*

c. The court of appeals' decision also misunderstands the nature of the risk taken by a secured lender. Repairs are not a sort of windfall improvement in the value of collateral. Repairs are an everyday occurrence. The secured lender takes the risk that the collateral will break down and become worthless; the secured lender also assumes the ordinary risks of wear and tear. The value of collateral such as a tractor gradually diminishes over time. Repairs simply retard the rate at which the value decreases. Far from being windfalls to secured creditors, repairs are essential in controlling the rate at which the value of the collateral is reduced. The court of appeals' decision changes the nature of the secured party's risk, however, by exposing the secured party to all of the erosion in value caused by wear and tear, while giving the secured party little benefit from the repairs that are part of the debtor's obligation.[22]

C. The court of appeals' decision in this case illustrates the difficulties in changing priority rule by judicial decision

Whatever its drawbacks, the first in time rule has one undoubted virtue: certainty. It is simple to understand and, once the identities and dates of the competing liens have been established, easy to administer. Because in questions concerning contractual

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[22] In this case the debtor agreed to "care for and maintain the collateral in a good and husbandlike manner" and "not [to] permit the collateral to be levied upon, injured or destroyed, or its value to be impaired" (A. 9).

dealings "it is more important that [the matter] be settled than that it be settled right" (*Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting))—the parties can rearrange priorities by contract, and the legislature can alter undesirable rules—it is important that any newly-devised judicial rule not cause a decrease in the certainty of the law and the ease of its administration.

We argued at pages 44-51 of our brief in *Kimbell Foods* that the course on which the Fifth Circuit has embarked will produce substantial uncertainty, and that only a legislative solution to questions of priority among competing liens offers the prospect of producing a certain and easily administrable rule. We offered the Fifth Circuit's opinion in the instant case as an example of the idiosyncratic and unpredictable nature of the evolving priority doctrine (*Kimbell Foods* Br. at 46 n.52). We expand on that discussion here.

The Fifth Circuit had indicated in earlier cases that it would use the U.C.C. as a model for devising rules of federal law in cases involving FHA loans. *United States* v. *Hext*, 444 F.2d 804, 810-811 (5th Cir. 1971). In this case, however, after deciding to abandon the first in time rule, the court did not turn directly to the U.C.C. Indeed, it could not do so. Section 9-310 of the Model U.C.C., the only arguably relevant portion of the Code, does not contain a complete priority rule; the U.C.C. instead refers the

reader back to state law.[23] Moreover, Georgia has not adopted the Model U.C.C. provision on this point.[24]

The court therefore first examined state law rather than the U.C.C. It concluded, however, that it would not follow state law here because that law probably would lead to a judgment in favor of the secured creditor,[25] and the court concluded that it should adopt

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[23] See note 8, *supra*, for text of Section 9-310 of the Model U.C.C. (1972 ed.).

[24] Ga. Code Ann. § 109A-9-310 (1973) provides that "a preferred security interest in collateral takes priority over each and all of the liens * * * described in section[] 67-1701 * * *," with certain exceptions not relevant here. Section 67-1701(7) describes, among other things, a "lien[] in favor of mechanics on real and personal property." This apparently gives the secured creditor priority over repairmen's liens.

A number of other state statutes expressly provide that earlier perfected security interests have priority over repair liens, and they have been held to apply in lieu of Section 9-310. See, *e.g.*, *Bryce Hospital Credit Union, Inc.* v. *Warrior Dodge, Inc.*, 50 Ala. App. 15, 276 So. 2d 602, cert. denied, 290 Ala. 362, 276 So. 2d 607 (1973); *Bond* v. *Dudley*, 244 Ark. 568, 426 S.W. 2d 780 (1968) (vendor of automobile retains priority); *Pennington* v. *Alexander*, 103 Ill. App. 2d 145, 242 N.E. 2d 788 (1968); *Municipal Equipment Co.* v. *Butch & Son Deep Rock*, 185 N.W. 2d 756 (Iowa 1971); *White Motor Credit Corp.* v. *Sapp Bros. Truck Plaza, Inc.*, 197 Neb. 421, 249 N.W. 2d 489 (1977); *GMC Superior Trucks, Inc.* v. *Irving Bank & Trust Co.*, 463 S.W. 2d 274 (Tex. Civ. App. 1971); *Checkered Flag Motor Car Co.* v. *Grulke*, 209 Va. 427, 164 S.E. 2d 660 (1968) (only first $75 of repair lien has priority); *Freuhauf Corp.* v. *Huntington Moving and Storage Co.*, 217 S.E. 2d 907 (W. Va. 1975). See also Annotation, 69 A.L.R. 3d 1162, 1177-1180 (1976).

[25] See note 24, *supra*. The court of appeals considered Georgia law to be unclear (see Pet. App. 26a n.17) because, in enacting Section 109A-9-310, the state legislature had not

a rule of law more favorable to the repairman (Pet. App. 27a-28a). The court suggested that it would follow whichever available law—state law, the U.C.C., or some other principle—is most favorable to repairmen (*ibid.*).

This decision required the court to return to Section 9-310 of the Model U.C.C. as a possible source of federal law.[26] Because Section 9-310 does not apply unless the repairman has a lien otherwise valid under state law, the court of appeals then looked back to state law to determine whether respondent had a repairmen's lien. Applying state law, it found that respondent had a lien (Pet. App. 31a).

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repealed an inconsistent provision contained in Ga. Code Ann. § 67-2003 (1967), and because it later reenacted the inconsistent provision with amendments (see Ga. Code Ann. § 67-2003 (Supp. 1977)). But Section 67-2003 was replaced (albeit implicitly) by Section 109A-9-310; the reenactment of Section 67-2003 simply added a provision about storage liens that is irrelevant to repairmen's lien questions.

[26] The court argued that "application of Uniform Commercial Code principles [in this case] ensures that the rights and duties of the FHA will be substantially the same as those of other lenders, and thus the reliance of third parties on state commercial rules will no longer be frustrated merely because a government lender enters the scene." Pet. App. 29a (footnote omitted). This statement makes no sense here, for the court of appeals admittedly is applying, under the U.C.C., rules different from those that would have prevailed under Georgia law. Respondent—the "third party" in this case—could not reasonably have relied on the Model U.C.C. in making his repairs. His only point of reference would have been state law or the first in time rule, and the court's decision to apply the Model U.C.C. to this transaction must have surprised respondent as much as it surprised the United States.

Having followed the U.C.C. this far, the court abandoned it once more. The last part of Section 9-310 refers to state law a second time for the purpose of determining whether some other state statute provides for a priority in the secured creditor rather than in the repairman (see note 8, *supra*). Recognizing that Georgia law, which Section 9-310 would apply here, probably gives priority to the FHA (see notes 24 and 25, *supra*), the court refused to follow the U.C.C.'s second reference to state law (Pet. App. 29a n.19, 32a n.20.). It selected, once more, whatever available rule was most favorable to repairmen; here, it concluded, the most favorable rule is the U.C.C. provision shorn of the final "unless" clause.[27]

It then became necessary to construe the portion of the U.C.C.—a portion the court of appeals adopted—giving the repairmen's lien priority when that lien is "upon goods in the possession of" the repairman. This

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[27] The court stated (Pet. App. 31a n.20) that respondent would be entitled to super-priority even if it were to give effect to the "unless" clause of Section 9-310. This is so, it stated, because the state statutes to which the "unless" clause refers include only the statutes *creating* the repairmen's lien. Here, because one statute creates the lien and a separate state statute makes that lien subordinate to a prior security interest, the court of appeals concluded that the U.C.C. would give respondent's lien priority. We submit that this approach is hair-splitting without redeeming virtue; the evident purpose of the U.C.C. is to follow any "explicit" state law subordinating the repairmen's lien to a prior security interest. Georgia law contains such a subordination rule; indeed, the subordination rule is placed in Georgia's version of the U.C.C (see note 24, *supra*).

part of the U.C.C. raised difficulties because, although the tractor was in respondent's possession at the time of the suit, it had been in and out of respondent's possession while the repairs were being made. The Model U.C.C. offered no clue about the priority of liens for repairs when the possession was discontinuous.

The court of appeals therefore departed from the U.C.C. for a third time and incorporated the "possession" requirement of the Tax Lien Act, which does contain a rule for dealing with multiple, successive episodes of possession. The Tax Lien Act gives priority to a repairman's lienor only to the extent that lienor has been in "continuous[]" possession of the chattel "from the time such lien arose" (26 U.S.C. 6323(b)(5)). Here respondent had been in "continuous" possession of the tractor only during and after the last repairs, which were billed at $543.81. The court of appeals therefore gave respondent priority over the government to the extent of $543.81, and the government retained its security interest in the remaining value of the tractor (Pet. App. 33a-35a).

No one could have predicted this result. The court selected snippets of state law, the Model U.C.C., and the Tax Lien Act in formulating a hybrid rule. No similar rule can be found in any statute or principle of the common law. No one could predict what rule would be applied tomorrow to a slightly different form of lien, because that lien might exist under slightly different provisions of Georgia law that the court of appeals might incorporate in place of the Tax Lien

Act or the U.C.C. And the rule in Maine might be completely different. See *Chicago Title Insurance Co.* v. *Sherred Village Associates*, 568 F.2d 217 (1st Cir. 1978), petition for cert. pending *sub nom. Hercoform, Inc.* v. *Chicago Title Insurance Co.*, No. 77-1611. It is not overstating the matter to say that, so long as an analysis similar to that used by the court of appeals prevails, the FHA, and the other lending agencies of the United States, can have no idea what rule of priority will be applied to their security interests.

Our point is not that the court of appeals' formulation of a new federal rule is inferior to some other possible formulation. It is, rather, that there is no model rule, applicable to situations like the present one, on which courts can draw. The U.C.C. is not a suitable model because it incorporates state laws, and because different states have different versions of the U.C.C. State law is not suitable because incorporation of particular state laws contradicts the hypothesis, from which the court of appeals started, that there should be a uniform rule applicable to all federal liens throughout the Nation. Pet. App. 12a. See generally *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367 (1943). And the Tax Lien Act does not supply a satisfactory answer not only because—as we have argued in *Kimbell Foods*—Congress did not intend to apply the principles of that statute beyond tax cases, but also because it attempts to set up a special set of rules to deal with involuntary federal liens. Here, by contrast, the federal lien was created by contract. We submit, in sum, that

only the first in time rule can be administered in an efficient and equitable way by the courts in the absence of additional guidance from Congress. It may be that the first in time rule should be modified in some respects, but the appropriate body for that task is the legislature.

CONCLUSION

The judgment of the court of appeals, to the extent it awards respondent priority, should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

FRANK H. EASTERBROOK
Deputy Solicitor General

MARION L. JETTON
Assistant to the Solicitor General

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1644

UNITED STATES OF AMERICA, *Petitioner*

v.

ZAC A. CRITTENDEN, JR.,
d/b/a CRITTENDEN TRACTOR COMPANY

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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BRIEF FOR ZAC A. CRITTENDEN, JR., d/b/a CRITTENDON TRACTOR COMPANY

HOWELL HOLLIS III
FREEMAN & HAWKINS
618 Fulton Federal Building
Atlanta, Georgia 30303

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I N D E X

	Page
SUMMARY OF ARGUMENT	1
ARGUMENT AND CITATION OF AUTHORITY.	2
I. THE CHOATE LIEN DOCTRINE IS NOT APPLICABLE TO THIS CASE	2
II. FIRST IN TIME, FIRST IN RIGHT SHOULD NOT APPLY TO A POSSESSORY MECHANIC'S LIEN	5
A. STATE AND FEDERAL LAWS PROVIDE EXCEPTIONS TO THE RULE FOR MECHANICS .	5
B. FIRST IN TIME, FIRST IN RIGHT IS NOT COMMERCIALLY VIABLE OR EQUITABLY JUSTIFIED. . .	10
III. EXTENSION OF THE FIRST IN TIME RULE AND THE CHOATENESS DOCTRINE IS COMMERCIALLY DESTRUCTIVE	16
IV. THE U.C.C. IS AN APPROPRIATE GUIDE FOR ESTABLISHING FEDERAL COMMON LAW . . .	18

V. CRITTENDEN HAS A LIEN AGAINST THE TRACTOR UNDER THE APPLICABLE GEORGIA LAW 22

A. GA. CODE ANN. SEC. 67-2003 GIVES CRITTENDEN A LIEN WHICH IS SUPERIOR TO THE INTEREST CLAIMED BY THE FHA 22

B. GA. CODE ANN. SEC. 67-2003 IMPLIEDLY REPEALS ANYTHING TO THE CONTRARY IN GA. CODE ANN. SEC. 109A-9-310 . . 23

CONCLUSION 30

CITATIONS

CASES:

Barry v. Jordan, 121 Ga. 537, 49 S.E. 607 (1904) 27

Bellegarde Custom Kitchens v. Select-A-Home, Inc., 385 F. Supp. 318 (S.D. Me. 1974). . . . 10

Board of Education and Orphanage for Bibb County v. Zimmerman, 231 Ga. 562, 203 S.E.2d 178 (1974) 26

Britton v. Bowden, 188 Ga. 806, 5 S.E. 2d 47 (1939) 28

Caldwell v. Armstrong, 342 F.2d 485 (10th Cir. 1976) 16

Checkered Flag Motor Co. v. Grulke, 164 S.E.2d 60 (Va. 1968). 7

Citizens Co-Op Gin v. U. S., 427 F.2d 692 (5th Cir. 1970). 8

Clearfield Trust Co. v. U.S., 318 U.S. 363 (1943) 18

Collier v. Mitchell, 207 Ga. 528, 63 S.E.2d 338 (1951) 29

Commerce Acceptance, Inc. v. Press, 428 P.2d 213 (Okla. 1967). 7

Corbin Deposit Bank v. King, 384 S.W.2d 302 (CA, Ky. 1964). 7

Crest Finance Co. v. U.S., 368 U.S. 347 (1961) 3

Ferrante Equipment Co. v. Foley, 231 A.2d 208 (1967). 7

Page

Gables Lincoln-Mercury, Inc. v. First Bank and Trust Company, 219 So.2d 90 (Florida Appeals 1969). 7

Manufacturers Acceptance Corporation v. Gibson, 422 S.W. 435 (Tenn. 1967). 7

Nash v. National Preferred Life Insurance Company, 222 Ga. 14, 148 S.E. 2d 402 (1966) . . . 26, 27

Nickell v. Lambrecht, 185 N.W.2d 155 (CA, Mich. 1970) 7

Porter v. Steel Co., 120 U.S. 649, 673 (7 S. Ct. Rep. 741) . . 14

Poteat v. Butler, 231 Ga. 187, 200 S.E. 2d 741 (1973) 27

Schleimer v. Arrowhead Garage, Inc., 260 N.Y.S.2d 271, (1965) 7

Sirota v. Kay Homes, Inc., 208 Ga. 113, 65 S.E.2d 97 (1951) 29

Spence v. Roswell, 213 Ga. 145, 97 S.E. 2d 350 (1957) 28

Sprayberry v. Wyatt, 203 Ga. 27 (45 S.E.2d 625). 27

Stone Mountain Memorial Association v. Herrington, 255 Ga. 746, 171 S.E.2d 21 (1969) 29

Page

Strickland v. Peacock, 209 Ga. 773; 77 S.E.2d 14 (1953) 27, 28

Toledo, D. and B. R. Co. v. Hamilton, 135 U.S. 296 (1890) 13, 14

U. S. v. Crittenden, 563 F.2d 678, (5th Cir. 1977) 8, 15, 19

U. S. v. Karmel, 234 F.2d 577 (8th Cir. 1956) 18

U. S. v. Union Livestock Sales Co., 298 F.2d 755 (4th Cir. 1962) . . . 18

United States v. Chickasaw Co., 115 F.2d 135 (10th Cir. 1940) 10

United States v. City of New Britain, 347 U.S. 81 (1954). . . . 3

United States v. Pioneer American Ins. Co., 374 U.S. 84 (1963) 3

West End and Atlanta Street Railroad Co. v. Atlanta Street Railroad Co., 49 Ga. 151 (1873) 27

West Lake Fin. Co. v. Spearmon, 213 N.E.2d 80 (1965) 7

Williams v. Western and Atlantic Railroad Company, 142 Ga. 696 83 S.E. 525 (1914) 27

Page

Willow Creek Lumber Company v. Porter County Plumbing and Heating, Inc., 572 F.2d 588 (7th Cir. 1978). 2

Statutes:

26 U.S.C. § 6321. . . . . 2, 7, 8

26 U.S.C. § 6323(b)(5). 5, 8

31 U.S.C. § 191 2

Ga. Code Ann. § 67-2003 . . . . . 22, 24, 25, 26, 28

Ga. Code Ann. § 67-1701 . . . . . 23, 25, 26

Ga. Code Ann. § 109A-9-310 . . . . . 23, 24, 25, 26

Miscellaneous:

U.C.C. § 9-310 . . . . . 6, 7, 8, 19, 20

U.C.C. § 9-312 6

U.C.C. § 9-312(4) 17

51 Am. Jur 2d, Liens § 34 15

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 77-1644

UNITED STATES OF AMERICA, PETITIONER

v.

ZAC A. CRITTENDEN, JR.,
d/b/a CRITTENDEN TRACTOR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR ZAC A. CRITTENDEN, JR.,
d/b/a CRITTENDEN TRACTOR COMPANY

STATEMENT

Crittenden will address the argument of the U.S.A. in the order followed in the Brief for the U.S.A.

SUMMARY OF ARGUMENT

The choate lien doctrine should not be extended to embrace possessory liens in favor of persons who improve or enhance the value of personal property. The doctrine was created in the context of the Federal Tax Lien Act (26 U.S.C. § 6321, et seq., and the Insolvency Statute, 31 U.S.C. § 191). It has never been applied by this Court to situations where the government is a voluntary creditor.

The first in time, first in right rule is also inapplicable to a possessory mechanic's lien. Analogous statutory rules provide an exception to the rule. When considered in conjunction with the choateness doctrine, the first in time rule creates uncertainties and inequities for the business community. The expansion of these two doctrines into the private sector of business and commerce would create ambiguity, uncertainty, and chaos.

The government should conduct its voluntary loan programs in a manner consistent with customary commercial practices and should not be entitled to assert super-priorities to defeat competing liens, thereby reaping windfall profits.

The Uniform Commercial Code provides an orderly and well-constructed format for establishing rules of priority. Such rules conform to the realities of the market place and the expectations of the business community.

If this Court applies Georgia law, and not federal law, Crittenden has a special statutory lien which is superior to any lien claimed by the government.

ARGUMENT AND CITATION OF AUTHORITY

I.

THE CHOATE LIEN DOCTRINE IS NOT APPLICABLE TO THIS CASE.

The history of the choate lien test has been traced in the Briefs filed by the parties in this case and in Kimbell (No. 77-1359). The doctrine was developed in the context of the insolvency statute (31 U.S.C. § 191) and thereafter transported into the tax arena (26 U.S.C. § 6321). This Court has considered cases dealing with both areas, although several courts of appeals have applied the doctrine in cases where the U.S.A. held a non-tax lien such as a mortgage or security interest. See, e.g., Willow Creek Lumber Company v. Porter County Plumbing and Heating, Inc., 572 F.2d 588 (7th Cir. 1978). This Court has never extended the doctrine beyond the insolvency statute or the Tax Lien Act.

Crittenden's case has nothing to do with taxes. Furthermore, the insolvency statute, 31 U.S.C. § 191, has no application. (This is conceded by the U.S.A. in its brief -- Brief of U.S.A. at 14, n. 13). Therefore, the U.S.A. is urging this Court to extend and amplify the choate lien doctrine into a new and different area.

This case raises the question of whether the doctrine of choateness has, or should have, any applicability to mechanics' liens, and more specifically to possessory liens on personal property for repair or improvement to that property. This Court established a three-part test to determine whether a lien was choate in United

States v. City of New Britain, 347 U.S. 81 (1954). The amount due, the identity of the lienor, and the property subject to the lien must be certain.

In the case of a possessory mechanic's lien, the identity of the lienor and the property subject to the lien are certain on the date that possession is transferred to the mechanic. The amount due may become certain, as between the owner and mechanic, at one of three different times: A) when contracted for in advance; B) when the repairs are completed and the owner accepts the repair bill as fair and just; or C) if the amount is contested, when judgment is entered on behalf of the mechanic. But, as to the U.S.A., a judgment is generally required. U.S.A. v. Pioneer American Ins. Co., 374 U.S. 84 (1963). Compare Crest Finance Co. v. U.S., 368 U.S. 347 (1961).

However, as a practical matter, a mechanic's lien for repairs will almost always attach subsequent to some other ownership interest. Typically, the issue as to priority is never joined unless some entity claims a lien by virtue of a prior mortgage or security interest. Therefore, the government's conclusion that the choate lien doctrine is dispositive of this case is misplaced because it assumes that the doctrine applies.

The facts of this case do not lend themselves to clear analysis of the choate lien doctrine because Crittenden's lien arose after the government lien. If the facts are changed, the issue is clarified. For example, assume Crittenden came into possession of the tractor and then Bridges

borrowed from FHA (which loan was secured by a security agreement covering the tractor) while Crittenden was still in possession of the tractor. Under the choate lien test, Crittenden's possessory mechanics' lien might not be cognizable until reduced to judgment, which could occur after the FHA lien attached. Under this example, the mechanic has no method of protecting himself, since the FHA lien arises after the tractor was delivered for repairs. But, under the choate lien test the FHA would prevail.

It is somewhat awkward to apply the choateness doctrine to this case in the first instance. Crittenden's lien was not existent when the U.S.A. perfected its lien. In its brief, the government, in effect, analyzes a non-existent lien in terms of choateness. It is not surprising that the non-existent lien fails to pass the choateness test. (The government filed its security agreement months before Crittenden began work on the tractor).

From the foregoing, and from the history of the choate lien test, it is obvious that the doctrine of choateness was developed to determine the status of particular liens. None of the cases cited by the U.S.A. analyze a non-existent lien in light of the choate lien test. It is something of an exercise in futility to examine Crittenden's lien by the standard of the choate lien test, since, by definition, the examination is confined to the period of time preceding the attachment by the government's lien.

The choate lien doctrine may well have utility in determining priorities

where the government is an involuntary creditor. Collection of taxes and debts from insolvents are unilateral governmental activities. However, the voluntary loan programs (FHA, SBA, etc.) represent efforts characterized by a mutual exchange of information and bargaining before a loan is made. In such a commercial setting, the usual and expected rules of commerce should apply. The choate lien doctrine should not be extended to measure the viability of statutory liens which arise subsequent to the government consensual lien.

Additionally, the choate lien test was developed in the context of insolvency and tax lien areas. By statute, 26 U.S.C. § 6323(b)(5), a tax lien is inferior to "a lien under local law securing the reasonable price of the repair or improvement of such property . . . ." Thus, in the tax lien area, the question of choateness is not relevant if personal property subject to a possessory lien is the same property upon which the U.S.A. seeks to impose its tax lien. It is illogical to formulate a doctrine in the narrow area of tax and insolvency, to have that doctrine legislatively restricted, and then to extend the doctrine so as to ignore the legislative restriction.

II.

FIRST IN TIME, FIRST IN RIGHT SHOULD NOT APPLY TO A POSSESSORY MECHANIC'S LIEN.

A. STATE AND FEDERAL LAWS PROVIDE EXCEPTIONS TO THE RULE FOR MECHANICS.

The government appears to suggest in its brief that the first in time, first in right rule cannot be reconciled with a recognition of Crittenden's mechanic's lien. Crittenden does not espouse abandonment of the rule. Standing alone, it is a rule of law respected by state and federal lawmakers alike, embraced by the U.C.C. (§ 9-312). However, the laws of the states and of the United States recognize exceptions to the rule in favor of those who repair personal property while that property is in their possession. The Tax Lien Act (26 U.S.C. § 6323(b)(5)) provides:

> "(b) Even though notice of a lien imposed by Section 6321 has been filed, such lien shall not be valid --
>
> "(5) -- with respect to tangible personal property subject to a lien under local law securing the reasonable price of the repair or improvement of such property, as against a holder of such a lien, if such holder is, and has been, continuously in possession of such property from the time such lien arose."

Also, under the laws of most states, the exception is recognized in the Uniform Commercial Code, § 9-310, which provides:

> "When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected

> security interest unless the lien is statutory and the statute expressly provides otherwise."

The stated purpose of the foregoing section, according to the official comments to the 1966 Uniform Commercial Code, is to "provide that liens securing claims arising from work intended to enhance or preserve the value of the collateral take priority over an earlier security interest even though perfected."

Jurisdictions which have considered UCC § 9-310 have consistently held that possessory liens arising by operation of law have priority over previously filed and perfected security interests. See Corbin Deposit Bank v. King, 384 S.W.2d 302 (Ky. Ct. of App., 1964); Schleimer v. Arrowhead Garage, Inc., 260 N.Y.S.2d 271, (1965); West Lake Fin. Co. v. Spearmon, 213 N.E.2d 80 (1965); Commerce Acceptance, Inc. v. Press, 428 P.2d 213 (Okla. 1967); Ferrante Equipment Co. v. Foley, 231 A. 2d 208 (1967); Manufacturers Acceptance Corporation v. Gibson, 422 S.W. 435 (Tenn. 1967); Gables Lincoln-Mercury, Inc. v. First Bank and Trust Company, 219 So.2d 90 (Fla. App. 1969); Checkered Flag Motor Co. v. Grulke, 164 S.E.2d 60 (Va. 1968); Nickell v. Lambrecht, 185 N.W.2d 155 (Mich. Ct. of App., 1970).

The philosophy and design of U.C.C. § 9-310 and 26 U.S.C. § 6323 is to protect those persons whose work enhances or preserves the value of collateral. In theory, in practice, and in this case, the U.S.A. is in just as good a position as, if not better, than it was prior to Crittenden's labor and repairs. The government has

never suggested that Crittenden failed to enhance or to preserve the value of the tractor, nor that the amount of the lien asserted by Crittenden was unreasonable. The fact that the government makes a windfall profit from the application of the first in time, first in right rule is understandably ignored by the government.

In its brief, the government suggests that the abandonment of the first in time, first in right rule would "undercut federal property rights." (Brief of U.S.A. at 24). As noted by the Fifth Circuit in its opinion in this case, § 9-310 has been interpreted to deny mechanics' liens priority for any part of the mechanic's charges that are unreasonable. U.S. v. Crittenden, 563 F.2d 678, 687, n. 15 (5th Cir. 1977). Furthermore, § 6323 only subordinates a federal tax lien to the "reasonable" price of repairs or improvement. The government does not risk loss at the hands of a mechanic who might charge unreasonable amounts for his services rendered.

The foregoing statutes represent legislative enactments according preferential status to mechanics. These enactments do not represent a wholesale abandonment of the first in time, first in right rule, but rather, an equitable exception. In construing § 6323(b)(5) in Citizens Co-Op Gin v. U. S., 427 F.2d 692, 698 (5th Cir. 1970), the Court commented:

> "The statute was designed to protect all businessmen who operate informally, depending upon an oral agreement and his possession to enforce his claim for a reasonable fee

> for services which render the property more valuable . . . . The person involved, because of the informality of the transaction and well-established custom, is unlikely to check the tax notices or obtain a written security agreement, but he does by custom retain control of the property until he is paid. When such a transaction -- whether it be the repair of an automobile or the harvesting and ginning of cotton -- increases the value of the property, we think Congress intended that the workers' security be protected against the federal tax lien. To hold otherwise would create injustice and hardship, a result contrary to the remedial purposes of the statute."

Therefore, it is clear that a possessory mechanic's lien is not alien to the first in time, first in right rule, but, rather, an acknowledged and accepted commercial exception to that rule. The utility of the first in time, first in right rule is not impaired by the recognition of the validity of a possessory mechanic's lien. It should be noted that the priority is a limited one, measured by the value of repairs performed.

The government's suggestion that the application of the first in time rule to the facts of this case is settled law is not accurate; it is unsettled by virtue of the fact that there is a split of opinion in the various courts of appeal. Additionally the government concludes: "The first in time rule has been regarded by common consent as the common law rule and relied on in thousands, perhaps millions,

of federal loans." (Brief of U.S.A. at 18.) The government does not reveal the nature of the common consent to which it refers, and indeed, the split in the circuit courts reflects a lack of consent.

B. FIRST IN TIME, FIRST IN RIGHT IS NOT COMMERCIALLY VIABLE OR EQUITABLY JUSTIFIED.

The first in time rule is a much more powerful and omnipresent rule of priority when used in conjunction with the choate lien test.

In Bellegarde Custom Kitchens v. Select-A-Home, Inc., 385 F. Supp. 318 (S.D. Me. 1974), a mechanic installed equipment in a residence, with the knowledge and consent of FHA, and prior to the recordation of an FHA mortgage. State law provided for judgment in favor of the mechanic. Applying the doctrine of choateness, in conjunction with the first in time rule, the court held that the FHA mortgage had priority. (That case did not involve a possessory lien.) Yet, in its brief, the FHA suggests that a repairman approach the FHA and seek a partial release. This simplistic solution is fraught with problems.

In United States v. Chickasaw Co., 115 F.2d 135 (10th Cir. 1940), the rural supervisor of a Department of Agriculture program customarily permitted waiver of U. S. liens under certain circumstances. The court held that since the local agent had no expressly conferred power emmanating from an authorized source, he could not waive by conduct or otherwise the lien of the United States Government. The United States took the position that its local

agent was without power to waive a lien of the United States. There does not appear to be any statutory provision for waiving lien priority with respect to the FHA loan program. Thus, there is some question as to whether a partial release from local FHA officials would even be binding on FHA, under current law, with respect to the tractor repairs.

Additionally, FHA may enter a commercial situation after development or repairs have begun. For example, in Bellegarde, supra, if the mechanic had at all times dealt with state commercial lenders, his lien would be valid. But, his priority could be defeated by the owner if the mortgage in question were transferred to a federal lender. (This is similar to the situation encountered in Kimbell, 77-1359). Under such circumstances, a mechanic's priority could be secretly defeated by virtue of the fact that the debtor refinances through a federal loan program rather than a local commercial lending institution. A mechanic might check the appropriate records and determine that the item in question is subject to a security interest in favor of a local bank, and, therefore, begin repairs with the knowledge and assurance that he will receive value for his services. But, if that security interest is assigned to the United States during the period of time when the item is being repaired, his expectations are thwarted and his lien is defeated.

Notwithstanding the foregoing, the FHA suggests that "if the FHA were convinced that the repairs would improve the value of the collateral by more than the cost of the repairs, it might release some of the

collateral." (Brief of U.S.A. at p. 20). This ivory tower proposal ignores the realities of the life of a farmer. A farmer has two critical periods of time for each of his crops -- planting and harvesting. If a farmer's tractor or harvester breaks down during a critical period, the repair of the machinery becomes an emergency. Under such circumstances, FHA suggests that the debtor, the FHA, and the repairman go to the bargaining table and hammer out a modification to the written security agreement. This assumes (a) that a repairman has checked the appropriate records and determined that an item is subject to a federal lien; (b) that the repairman has called the owner and arranged for a meeting of all parties; (c) that the repairman will leave his shop a second time to go to a meeting of the parties; (d) that the repairman is even interested in making repairs to an item under such complex contractual arrangements; and (e) that the harvest has not been killed by frost by the time that all of the arrangements are made.

The FHA also suggests that repairmen "require debtors to advance the funds for the repairs or to provide other security for work done on credit." (Brief of U.S.A. at 21). Though such a procedure certainly removes the possibility of a dispute such as the present one, it would also involve changing the custom of a nation. As a practical matter, in many instances a repairmen or mechanic does not know how much the repairs will cost prior to their performance. In this case, several gaskets and valves were replaced in the tractor (A. 21). There is no way to know with any degree of certainty the extent of the re-

pairs necessary, prior to instituting repairs.

In its brief, the U.S.A. compares and contrasts a grocer with a repairman in an effort to show that equity does not require any preferential treatment for a repairman. In doing so, the U.S.A. quietly moves the mechanic into that class of businessmen known as merchants. However, the grocer, the seed merchant, and the farm machinery dealer are in the business of selling goods owned by them to third parties. Title to the property passes from the merchant upon delivery of the goods. On the other hand, the repairman is in the business of servicing property owned by others. He is typically a bailee for the true owner and has a responsibility to use some degree of care to preserve and maintain the item to be repaired.

In support of its position that this Court has required subsequent lienors to arrange with secured creditors to do work, the U.S.A. cites Toledo, D. and B. R. Co. v. Hamilton, 135 U.S. 296 (1890). However, that case does not support the principle cited by the government. That case recited that Ohio had no statute in force at the time that the prime mortgage was executed which gave any priority to subsequent mechanics' liens. Furthermore, the Court noted that the work performed by the mechanic was original construction, not in keeping up, as a going concern, a railroad already built. Thus, the Court explained the distinction between those cases which, for equitable reasons, granted priority to unsecured subsequent creditors over a mortgage debt, as follows:

"The claims of the appellees are for the original construction of the railroad. This is not a case where the proceeds of the sale of property of a railroad, as a completed structure, open for travel and transportation are to be applied to restore earnings which, instead of having been applied to pay operating expenses and necessary repairs, have been diverted to pay interest on mortgage bonds and the improvement of the mortgaged property, the debts due for the operating expenses and repairs having remained unpaid when a receiver was appointed. The equitable principles upon which the decisions rest, applying to the payment, out of the proceeds of the sale of railroad property, of such debts for operating expenses and necessary repairs, are not applicable to claims such as the present, accrued for the original construction of a railroad while there was a subsisting mortgage upon it. These five appellees gave credit to the company for their work. It was construction work, and none of it was for operating expenses or repairs, and none of it went toward keeping a completed road in operation, either in the way of labor or materials." Toledo at 302.

From the foregoing, it is clear that the holding of Toledo, supra, is not supportive of the principle urged by the U.S.A., and that the above-quoted language clearly demonstrates the distinction between those who provide original merchandise, such as grocers, seed merchants, and farm machinery dealers, and those who provide repair services for items so that the

owner can continue the operation of an enterprise.

The district court found that Crittenden had an equitable lien against the tractor which was superior to the government's lien. The court of appeals did not decide the question. U. S. v. Crittenden, supra at 679, n. 1. "It is firmly established that an equitable lien may be imposed in favor of one whose money, materials, or services have benefited the property of another under circumstances entitling him to restitution. Thus, where a contractor or materialman supplies labor, materials, or equipment for the improvement of real property, a court of equity may, in appropriate circumstances, impress an equitable lien upon the improved property as security for payment for the improvements . . . ." 51 Am. Jur. 2d, Liens, § 34.

Unjust enrichment and windfall profits are the basis of the imposition of an equitable lien. If property were otherwise subject to a lien in favor of a mechanic, the true owner can profit by the mechanic's labors by virtue of the fact that the amount of his indebtedness to a secured lender is diminished since the repossessed collateral is more valuable. In the present case, Bridges declared bankruptcy, relegating the government to repossession of its collateral, since presumably the indebtedness was discharged. Here, the government directly benefits from the mechanic's labors.

"An equitable lien is a creature of equity, is based on the equitable doctrine of unjust enrichment, and is the right to have a fund or specific property applied

to the payment of a particular debt. Such a lien may be declared by a court of equity out of general considerations of right and justice as applied to the relationship of the parties." Caldwell v. Armstrong, 342 F.2d 485, 490 (10th Cir. 1965). A mechanic only seeks a lien against property for that increment of the property which has been added by the mechanic. Since a tractor is not easily divisible, the lien is asserted on the whole property, but only to the extent that the mechanic has added value to the property by his repair. From both an equitable and commercial standpoint, a repairman is different from a merchant. The same principles which suggest that an equitable lien should apply in this case should be carefully examined before being discarded in favor of a doctrine which neither serves equity nor comports with commercial expectation.

III.

EXTENSION OF THE FIRST IN TIME RULE AND THE CHOATENESS DOCTRINE IS COMMERCIALLY DESTRUCTIVE.

The government has taken the liberty of incorporating by reference in its brief all the arguments which it made in Kimbell Foods, Inc., No. 77-1359. Crittenden, therefore, incorporates by reference the arguments made by the respondent and the amicus curaie (National Commercial Financial Conference, Inc.) in the Kimbell case. However, there are additional reasons for not extending the first in time and choate lien doctrines which are discussed below.

The law has historically given special priority to a purchase money security

interest, notwithstanding the fact that there may be a conflicting security interest in the same collateral, if certain conditions are met. This policy is reflected in U.C.C. § 9-312(4) which gives priority to a purchase money security interest if the interest is perfected within ten days of the transfer of possession of the collateral. Under the choate lien doctrine, a security interest is not usually definite enough to be cognizable to a federal court, until it is reduded to judgment. Thus, the U.S.A. would have the right to subordinate purchase money security interests to a federal lien. Under the government's argument, it is not bound by the U.C.C. Thus, purchase money security interests would be held to the same standard of choateness as any other lien.

If the government prevails in this case, every purchase money mortgage and security interest in this country is jeopardized if the government has now or obtains a security interest with respect to the same collateral. The ramifications of such a governmental priority are staggering. The government has suggested that any alternative to the first in time and choate lien doctrines would produce uncertainty. Crittenden suggests that if the doctrines are thrust into the ordinary stream of commerce and commercial transactions, it will produce chaos.

The government argues that both the FHA and SBA should be given priority status because of pervasive public policy. The monies lent by government lending agencies come from tax dollars. The FHA lends those tax dollars back to persons

who are unable to borrow money from any other source, and are thus substandard risks. Naturally, the loan losses for the FHA will be greater than the loss experience of most commercial institutions because of the substandard risk. The government, therefore, reasons that since its risks are substandard, it should be entitled to assert liens superior to mechanics' (thereby reaping windfall profits) so that it can continue to make loans to substandard risks. In this case, the government contends that it should be permitted to transfer the value of Crittenden's repairs back to the revolving fund. Thus, Crittenden not only subsidizes the government loan programs through the payment of tax dollars, but also finds himself in a position of directly subsidizing a loan program which denies recognition of his possessory mechanic's lien.

IV.

THE U.C.C. IS AN APPROPRIATE GUIDE FOR ESTABLISHING FEDERAL COMMON LAW.

The cases on both sides of the issue presented in this case tend to conclude that federal law should be applied when determining the rights of the USA under programs such as SBA and FHA, under the rationale of Clearfield Trust Co. v. U.S., 318 U.S. 363 (1943), contra, see U. S. v. Union Livestock Sales Co., 298 F.2d 755 (4th Cir. 1962); U. S. v. Karmel, 234 F.2d 577 (8th Cir. 1956). There are several possibilities here. If state law applies, then this Court need only decide this case under Georgia law, which discussion is reserved for a latter portion of this brief. If federal law applies, and the federal

rule is to apply state law, then the result will be the same as applying state law. If, on the other hand, federal law applies, and the laws of a particular state do not apply, then the Court must fashion a federal rule. In this case, the court of appeals determined that it would fashion the uniform federal rule based upon U.C.C. § 9-310. There is strong justification for applying the U.C.C.

It should be noted that the federal government relies upon the Uniform Commercial Code to perfect its security interests in the present case. The financing statement which was filed by FHA (A. 11) states: "This statement is presented for filing pursuant to the Uniform Commercial Code." Furthermore, the form defers to state law with respect to the name of the owner of the real estate upon which the crops are to be grown, showing by way of an asterisk, "record owner if required by state law, otherwise reputed owner." (A. 11). Thus, the government utilizes the laws of the various states to perfect its security interests in collateral.

The U.C.C. has provided a relatively uniform filing system in almost all states, which greatly simplifies the procedure by which a party may perfect security interests around the country. In its brief before the Fifth Circuit, FHA contends that the use of a pre-printed form in its activities provided necessary uniformity to the FHA loan program. As noted by the court, the FHA uses the same form to secure loans throughout the country. U.S.A. v. Crittenden, supra at 682. The uniform nature of

the Uniform Commercial Code allows FHA to use a single printed form in all the states where it administers loan programs with the additional knowledge and protection that the sufficiency of that form will be determined by a federal court, and will not be subjected to varying interpretations from state to state. Yet, the root of the protection is local law which has been adopted by almost all states, which provides for a uniform system of filing and perfection of security interests. Thus, the source of FHA's perfected security interests is state law. Yet, FHA suggests that the concomitant rules of law (such as § 9-310) be ignored for reasons of federal policy.

To the extent that the federal government is able to utilize the offices of the various states in the recording of deeds, mortgages, and security agreements, both the FHA and the public reap the benefits of the uniform system. It also obviates the necessity of Congress passing legislation establishing filing offices for federal judgments, liens, and encumbrances, and paying for the separate maintenance of such offices. The local laws of the states which have enacted the U.C.C. lend continuity and efficiency to the FHA loan programs. FHA suggests that this Court grant FHA the safeguard provided by state law and that it reject those aspects of state law which might tend to divest FHA of some interest in property, notwithstanding the fact that the divestiture is pursuant to those same uniform rules. Such a posture is certainly illogical and unreasonable.

Reference to state law is found throughout the security agreement granted by Bridges to the U.S.A. (A. 7 through 10).

Item 1 of the security agreement refers to state law with respect to period of years that the security agreement attaches to crops (A. 8). Elsewhere, the security agreement expressly subordinates the security to "any applicable landlord's statutory liens." (A. 9). Further, Part IV(c) provides that the proceeds from disposition are applied first to expenses incurred by the secured party in selling collateral, second "to the satisfaction of prior security interests or liens to the extent required by law," and thirdly, to the satisfaction of the debt secured by the security agreement. (A. 10). The security agreement is replete with references to the "law" without ever specifying which law (state or federal). It expressly excludes a landlord's statutory lien, thus acknowledging the priority of a state lien created by statute with respect to a certain class of persons, and its priority over the FHA.

The government summarizes its objection to applying the U.C.C. by stating: "Only the first in time rule can be administered in an efficient and equitable way, in the absence of additional guidance from Congress." (Brief of U.S.A. at 11). Of course, the first in time and choate lien doctrines were developed by the courts. They were not developed to be a guide for commercial transactions. They do not have the force of any statute, and this Court has never applied them to a situation where the government was a voluntary commercial lender. The adoption of the Uniform Commercial Code represented a great stride forward for the commerce of this country. It lends efficiency and certainty to the business community, the source of this country's

lifeblood. If the choate lien test, in conjunction with the first in time rule were introduced into the stream of commerce, it would serve as a poison to the system, imposing uncertainty and confusion with respect to non-governmental lending and extension of credit. The programs which were designed by Congress to instill productivity and to stimulate the economy will succeed in stagnating growth and expansion.

Since the U.C.C. was used by the government to perfect its interest in the tractor, and because the U.C.C. was designed to deal with precisely the kind of commercial situation here involved, it should be applied to this case. If the United States is to engage in commercial lending and yet be governed by rules foreign to commerce, Congress should so mandate, not the courts.

V.

CRITTENDEN HAS A LIEN AGAINST THE TRACTOR UNDER THE APPLICABLE GEORGIA LAW.

A.

GA. CODE ANN. § 67-2003 GIVES CRITTENDEN A LIEN WHICH IS SUPERIOR TO THE INTEREST CLAIMED BY THE FHA.

If state rather than federal law is applied to this case, Crittenden's lien is superior to that of FHA, and the district court was correct in so holding. (Pet. App. 40A-41(a)). Ga. Code Ann. § 67-2003 provides in pertinent part:

> "All mechanics of every sort, for work done and material furnished in manufacturing or repairing personal property . . . shall have a special lien on the same, which may be asserted by retention of such property . . . and shall be superior to all liens except liens for taxes and such other liens as the mechanic may have had actual notice of before the work was done or material furnished." (Ga. L., 1972, p. 415).

The government has never questioned that the sums due Crittenden for his labors are fair and reasonable charges for the work. Under the plain language of the above-cited statute, Crittenden is entitled to satisfy his mechanic's lien out of the proceeds of the sale of the tractor in question.

B.

GA. CODE ANN. § 67-2003 IMPLIEDLY REPEALS ANYTHING TO THE CONTRARY IN GA. CODE ANN. § 109A-9-310.

The mechanic's lien was established in Georgia in 1873 (Ga. L., 1873, p. 42), since codified as Ga. Code Ann. § 67-1701 (7)). By the same 1873 act, the scope and enforcement of the mechanic's lien was defined as follows:

> "That all mechanics, of every sort, for work done and material furnished in manufacturing personal property, or for repairing personal property, shall have a special lien on the same, which must be asserted by retention of such property, and not otherwise. The lien arising under

this section shall be lost by the surrender of such personal property to the debtor, and shall be superior to all liens, but liens for taxes, and such other liens as the mechanics may have actual notice of, before the work was done, or material furnished." (Ga. L., 1873, p. 44; Ga. Code Ann. § 67-2003).

This statute was amended by Ga. L., 1884-5, p. 43; 1953, Nov. Sess., p. 275; 1960, pp. 912, 913. In 1960, the Act read in pertinent part as follows:

"All mechanics of every sort, for work done and material furnished in manufacturing or repairing personal property shall have a special lien on the same, which may be asserted by retention of such property or the mechanic may surrender such personal property and give credit, when the same shall be in force in accordance with the provisions of Section 67-2401, and shall be superior to all liens, except liens for taxes and other liens as the mechanic may have had actual notice of before the work was done or material furnished."

Thus, in Georgia, the mechanic's lien was "superior to all liens" save those excepted in the statute. Such was the law in Georgia for almost ninety years, until 1962, when the legislature enacted the Uniform Commercial Code. When it was first enacted in Georgia in 1962, Section 109A-9-310 read as follows:

"When a person in the ordinary course of his business furnishes

services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest only if the lien is statutory and the statute expressly provides such priority by specific reference to the section."

In 1963, the above-quoted section was struck in its entirety and a new section substituted in lieu thereof which provided in pertinent part as follows:

"Except as is expressly provided to the contrary elsewhere in this article, a perfected security interest in collateral takes priority over each and all of the liens, claims, and rights described in Ga. Code § 67-1701 . . . ."

In 1972, the Georgia General Assembly struck in its entirety Ga. Code § 67-2003, as amended by an act approved December 21, 1953 (Ga. L. 1953, Nov.-Dec. Sess., p. 275) and an act approved March 17, 1960 (Ga. L., 1960, p. 912) and inserted in lieu thereof a new § 67-2003 (Ga. L., 1972, p. 415).

The 1972 act, Ga. Code Ann. § 67-2003, impliedly repeals the 1963 act (Ga. Code Ann. § 109A-9-310).

"While repeal by implication is not favored, a statute will be held to have repealed a prior statute where the latter is clearly inconsistent and contrary to the most recently

enacted law or where the later enactment appears to cover the entire subject matter and give expression to the whole law on the subject. (Emphasis added). Nash v. National Preferred Life Insurance Company, 222 Ga. 14, 21; 148 S.E.2d 402 (1966).

As the Nash case indicates, there are two instances where a new enactment will work an implied repeal of an older act. This case involves the situation where the two acts are not consistent.

The basic test employed in determining whether there has been a repeal by implication is to determine whether the provisions of the two acts are repugnant or inconsistent to the extent that they cannot stand together. Board of Education and Orphanage for Bibb County v. Zimmerman, 231 Ga. 562 at 566; 203 S.E.2d 178 (1974).

The statutes here in question meet this test. Under the 1963 Act (§ 109A-9-310), all the liens embraced by Code § 67-1701, which includes mechanics' liens, were made inferior to security interests perfected in accordance with Article 9 of the Georgia version of the Uniform Commercial Code. However, under the 1972 Act, mechanics' liens are made superior to all liens, save certain designated exceptions. The irreconcilable conflict arises from the fact that under the 1963 Act (§ 109A-9-310), a perfected security interest would be superior to a mechanic's lien, while under the 1972 Act (§ 67-2003), a mechanic's lien is superior to a perfected security interest.

In view of this irreconcilable

conflict, it must be determined which statute controls. In Georgia, "an affirmative statute is a repeal by implication of a precedent affirmative statute so far as it is contrary thereto." West End and Atlanta Street Railroad Co. v. Atlanta Street Railroad Co., 49 Ga. 151 at 153 (1873).

"An implied repeal arises from the enactment, the terms and necessary operation of which cannot be harmonized with the terms and necessary effect of the earlier act. Strickland v. Peacock, 209 Ga. 773 at 774; 77 S.E.2d 14 (1953).

". . . Where two sections of the Code are derived from acts of the legislature, and are in direct conflict, the section which is taken from the latter act will prevail as being the last expression of the law-making power on the subject. Barry v. Jordan, 121 Ga. 537; 49 S.E. 607 (1904).

Thus, by applying the most recent enactment rule, the 1972 Act impliedly repeals the 1963 Act.

Another rule of construction, so well established as to be known as the cardinal rule, is that courts will look to the intention of the Legislature in construing a statute. Poteat v. Butler, 231 Ga. 187; 200 S.E.2d 741 (1973), and cases cited therein.

This cardinal rule is applicable to implied repealers. "In the final analysis, however, the intention of the Legislature will control the question as to repeal by implication." Nash v. National Preferred Life Insurance Company, 222 Ga. 14 at 21;

145 S.E. 402 (1966).

And in analyzing the intent of the Legislature, it is important to keep in mind the presumption that the Legislature is well aware of the existing law when it enacts new statutes. "It is well settled in this jurisdiction that all statutes are presumed to be enacted by the Legislature with full knowledge of the existing condition of the law and with reference to it." Spence v. Rowell, 213 Ga. 145 at 150; 97 S.E.2d 350 (1957). (Emphasis added).

The intent of the legislature may be gathered from the words of the 1972 Act. "In order to bring about a repeal by implication, the legislative intent must be ascertained from the words of the act. Britton v. Bowden, 188 Ga. 806(1); 5 S.E.2d 47 (1939); Strickland v. Peacock, 209 Ga. 773 at 774; 77 S.E.2d 14 (1953).

The particular attention of the Court is invited to Ga. Laws 1972, p. 415. It did not amend the old Code § 67-2003. It struck that section and enacted a new one. The old Code § 67-2003 was "amended by striking such Code Section in its entirety and inserted in lieu thereof a new Code § 67-2003 . . . ." In the words of the General Assembly, the present Code § 67-2003 is a "new Code § 67-2003." The use of the word "new" is inconsistent with any inference of an intent to make this new section subject to any prior act of the Legislature. But the most definite expression of intent to assert the superiority of the mechanic's lien is found in the body of the act itself, which unequivocally states that the mechanic shall have a special lien which "shall be superior to all

liens . . . ."

"It is fundamental that the determining factor is the intent of the Legislature and [the court looks] first to the words of the statute to determine what that intent was and if those words be plain and unambiguous and the intent may be clearly gathered therefrom [the court] need look no further in determining what that intent was." Stone Mountain Memorial Association v. Herrington, 225 Ga. 746 at 749; 171 S.E.2d 21 (1969).

"And where, as here, the language of the Code Section is plain, unambiguous and positive and is not capable of two constructions, no court has a right to construe it to mean anything other than what it declares, and this rule, of course, precludes the courts from construing it according to what is supposed to be the legislative intent." Sirota v. Kay Homes, Inc., 208 Ga. 113, 115; 65 S.E.2d 97 (1951).

The intention of the Legislature is clear from the words of the statute. "It is the duty of the courts in the construction of statutes to give effect to the intention of the Legislature when it is ascertainable." Collier v. Mitchell, 207 Ga. 528 at 530; 63 S.E.2d 338 (1951).

Therefore, if Georgia law applies in this case, Crittenden's lien is superior to the government's lien by virtue of the priority established by Georgia statute. The District Court was correct in so holding.

CONCLUSION

The decision of the Court of Appeals should be affirmed for the reasons discussed above.

Respectfully submitted,

Howell Hollis III
Attorney for Zac A.
Crittenden, Jr.

December 20, 1978

618 Fulton Federal
Atlanta, Georgia 30303

Telephone: 404/522-0856

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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

ZAC A. CRITTENDEN, JR., d/b/a CRITTENDEN TRACTOR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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REPLY BRIEF FOR THE UNITED STATES

1. Respondent and amicus curiae National Farm & Power Equipment Dealer's Association rely alternatively on the Model Uniform Commercial Code (Resp. Br. 18–22; Amicus Br. 8–12) and on state law (Resp. Br. 22–29; Amicus Br. 13–17) as bases for upholding the decision of the court of appeals. That court, however, adopted neither of these theories. Rather, it used pieces of both of them, spliced together with a piece of the Federal Tax Lien Act of 1966 (see our main brief at 25–32). The attempt to recast the court's holding should be rejected, since neither state law nor the

Model U.C.C. provides a better standard than the clear and settled rule of first in time, first in right.

a. While amicus urges "a federal rule incorporating the applicable state law on relative lien priorities" (Br. 17) without mentioning what the applicable state law might be in this case, respondent argues at some length (Br. 22–29) that under Georgia law its repairman's lien in the tractor is superior to the prior-in-time lien of the Farmers Home Administration (FHA). This is a "state law quagmire" which the court of appeals elected to avoid, deciding that it would fashion a rule of federal common law instead (Pet. App. 26a n.17). This Court, we submit, should likewise avoid entanglement with this question of Georgia law. See, *e.g., Bishop* v. *Wood,* 426 U.S. 341, 345–346 (1976).[1]

Apart from the complexity of the question and the fact that the court of appeals did not decide it, a priority rule for federal contractual liens that turned on the particular law of each state would defeat the basic purpose of uniformity that counsels application of a federal rule in this area in the first place. See *Clearfield Trust Co.* v. *United States,* 318 U.S. 363,

[1] If the Court does reach the question, we submit that the court of appeals was correct in leaning to the view (Pet. App. 26a) that, by virtue of Ga. Code Ann. § 109A–9–310 (1973) (quoted in our main brief at 27 n.24), the superpriority claimed by respondent does not exist under Georgia law. The reenactment in 1972 of Ga. Code Ann. § 67–2003 (Supp. 1977) did not work a repeal of § 109A–9–310 by implication, as respondent claims (Br. 23–29); § 67–2003 is not part of the Georgia U.C.C., as § 109A–9–310 is, and the reenactment of § 67–2003 was evidently motivated by the addition of its provision concerning storage liens, which is irrelevant to the subject of repairmen's liens.

367 (1943). The court of appeals recognized this purpose (Pet. App. 12a), and this Court has pointed out that the first-in-time rule "is believed to be universal" (*Rankin* v. *Scott,* 25 U.S. (12 Wheat.) 177, 179 (1827)) and "is widely accepted and applied, in the absence of legislation to the contrary." *United States* v. *City of New Britain,* 347 U.S. 81, 85 (1954). Following state law would also mean, in cases where the state awards superpriority to repairmen's liens, abandoning a rule that this Court has viewed as a matter of fundamental fairness to prior lienholders (see our main brief at 15–16) in favor of one about which there is substantial disagreement (see *id.* at 21 n.19, 27 n.24, and generally 19–25). And it would mean that vested federal interests would be divested by later-arising liens, although Congress has not authorized this charge on federal funds. Thus, even if respondent were correct about what the law of Georgia provides, this Court should reject the invitation to abandon the first-in-time rule in favor of a new federal rule of lien priorities incorporating the differing rules of particular states.[2]

[2] Respondent's departure from the rationale of the court of appeals is emphasized by its requests for affirmance of the *district court's* decision (Resp. Br. 15–16, 22, 29). The district court accorded priority to the total amount of respondent's repairman's lien, while the court of appeals disallowed priority for the portion of the repair bill incurred prior to the tractor's last possession by respondent (Pet. App. 32a–35a). Since respondent did not cross-petition from the court of appeals' decision, the priority of the lien for the earlier repair bills is not before this Court. See, *e.g., Alaska Industrial Board* v. *Chugach Electric Association,* 356 U.S. 320, 324–325 (1958); *LeTulle* v. *Scofield,* 308 U.S. 415, 421–422 (1940).

b. Just as a rule based on state law may not be successfully invoked to support the decision below, neither may a rule based on the Model U.C.C. The reason is, at bottom, the same. The only provision of the Model U.C.C. that relates to repairmen's liens is Section 9–310 (1972 ed.).[3] This provision—which Georgia has not adopted[4]—does not contain a complete priority rule. Rather, it refers the reader back to state law to determine whether that law expressly provides that a statutory repairman's lien is not superior to a prior perfected security interest. (Contrary to amicus's claim about "virtually every state" (Br. 4), statutes in a number of states—like § 109A–9–310 in Georgia (see note 1, *supra*)—do expressly deny the superpriority to which U.C.C. 9–310 refers. See the authorities cited at page 27 n. 24 of our main brief.) Reliance on the Model U.C.C. thus requires reliance on state law after all, with all the defects of that approach.

It was pursuant to U.C.C. 9–310 that the court of appeals here first looked to Georgia law, found it unclear at best and probably unfavorable to respondent's claim (Pet. App 26a & n.17), and thereupon decided to fashion a federal rule which would give the repair-

[3] It provides:

"When a person in the ordinary course of his business furinshes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise."

[4] One reason why the U.C.C. is unsuitable as a model for a federal rule is that different states have different versions of it.

man priority even if Section 9–310 and state law commanded a different result—"even if the state statute creating the mechanic's lien provided that the lien was not superior to prior perfected security interests" (Pet. App. 32a n.20). Thus, in the end the court rejected a crucial part of the Model U.C.C. approach that respondent and amicus would have this Court adopt. And in the process the court demonstrated that the Model U.C.C., because it incorporates state law, would not provide a uniform and predictable priority rule.[5]

In sum, once the courts decide to abandon the first-in-time rule as the fundamental standard for the federal common law of lien priorities, neither the U.C.C. nor the law of the states provides a more acceptable result than the kind of judicial pastiche produced by the court of appeals here. If modifications of the first-in-time rule are desirable, Congress is the only body that can make them with the certainty, the predictability, and the policy decisions that are required.

2. Respondent and amicus contend (Resp. Br. 16–17; Amicus Br. 11–12) that because the FHA has provided by regulation that purchase money security interests take priority over earlier-arising FHA liens

[5] As the First Circuit noted in rejecting the approach taken by the court below, "[r]ecourse to the local law governing mechanics' liens * * * would incorporate many local eccentricities." *Chicago Title Insurance Co.* v. *Sherred Village Associates*, 568 F. 2d 217, 222 (1st Cir. 1978) (footnote omitted), petition for cert. pending *sub nom. Hercoform, Inc.* v. *Chicago Title Insurance Co.*, No. 77–1611.

(7 C.F.R. 1921.106), the agency has "recognize[d] the demise of the inchoateness and first in time doctrines" (Amicus Br. 12). In the interest of consistency, they argue, the FHA must also accord superpriority to respondent's possessory lien for repairs.

But priority for purchase money mortgages is not necessarily inconsistent with the first in time and choateness doctrines. Under case law applying the choateness requirement in the context of tax liens prior to the 1966 Federal Tax Lien Act (26 U.S.C. 6323), it was "generally * * * held that [purchase money mortgages] are protected whenever they arise. This is based upon the concept that the taxpayer has acquired property or a right to property only to the extent that the value of the whole property or right exceeds the amount of the purchase money mortgage." H.R. Rep. No. 1884, 89th Cong., 2d Sess. 4 (1966). If title to the chattel secured by a purchase money mortgage passes to the purchaser only to the extent of his equity, property to which the federal lien can attach may be limited to that equity. See also Rev. Rul. 68–57, 1968–1 Cum. Bull. 553; Uniform Commercial Code Section 9–312 and Comment (1972). The FHA regulations follow this view of purchase money security interests, giving them priority from the time they arise, provided that they are promptly perfected in the manner set forth in the regulations. 7 C.F.R. 1921.106.

But even if this conceptual basis for the regulations did not exist, the FHA could, as a matter of policy,

distinguish for priority purposes between purchase money security interests and repairmen's liens. The Secretary of Agriculture is authorized to subordinate FHA liens in appropriate circumstances. 7 U.S.C. 1981(d), as amended by Pub. L. No. 95–334, Section 121, 92 Stat. 427. He might well conclude that purchase money mortgages warrant priority over earlier-arising FHA liens while repairmen's liens do not, if only because there is substantial disagreement about the merits of superpriority for repairmen's liens. See our main brief at 22 n.19, 27 n.24.

3. Respondent and amicus point to instances where FHA regulations direct agency personnel to follow state law (Resp. Br. 19–20; Amicus Br. 13–16), and they conclude that, to be consistent, the agency should also follow state law with respect to lien priorities.

The regulations in question, however, deal primarily with housekeeping matters such as filing requirements and forms. The United States is not relinquishing any property interest if it follows these state requirements, which promote the convenience of all parties. It is reasonable for the agency to direct its staff to comply with state law on these matters.[6] State laws according superpriority to competing non-federal liens, in con-

[6] Amicus observes (Br. 13) that the FHA follows state law in determining who is the owner of real property. This practice is consistent with decisions of this Court applying state law to determine whether property is owned by the taxpayer, while rejecting state law insofar as it sets the relative priorities of federal tax liens and other liens. *Aquilino* v. *United States*, 363 U.S. 509, 513–514 (1960).

trast, undercut vested federal property interests. It is equally reasonable for the agency to decline to accede to these statutes that would occasion financial losses to the federal government and to FHA programs in particular.[7]

4. Finally, respondent and amicus complain (Resp. Br. 11–12; Amicus Br. 7–8) that the realities of the repairman's business make it impossible for him to protect himself if the first-in-time doctrine is applied, and that as a consequence borrowers from the FHA will have great difficulty in finding anyone who is willing to repair their equipment. We doubt that the elaborate procedures respondent envisions (Br. 12) would be necessary to protect the repairman.[8] Equipment repairs apparently continue to be made in the many states that do not accord a superpriority to repairmen's liens (see our main brief at 27 n.24). Amicus, which has "31 affiliated associations represent[ing] 10,325 dealers in the 48 contiguous states" (Br. 2), makes no claim that any of these dealers experience difficulties, or even notice the difference, in the states that deny superpriority. One may infer

[7] Amicus apparently asserts (Br. 6) that 7 C.F.R. 1930.44 subordinates FHA liens that would have priority under the choate lien doctrine. That section, however, merely recognizes that even under the choate lien doctrine, some liens will be superior to the FHA lien; it provides for the payment of such prior liens, in those instances where the FHA is custodian of the proceeds of a nonjudicial liquidation sale.

[8] Respondent questions (Br. 11) our statement (Brief for United States at 20–21 & n.18) that the FHA can subordinate its lien to a repair lien. This is expressly authorized in the case of "major repairs and parts" by 7 C.F.R. 1930.30(b).

that, as a practical matter, satisfactory accommodations are made between the interests of repairmen and of secured lenders. To the extent that this may not be the case, a remedy is available in Congress.

CONCLUSION

For the foregoing reasons and the reasons given in our main brief, the judgment of the court of appeals, to the extent it awards respondent priority, should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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IN THE

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OCTOBER TERM, 1978

No. 77-1644

UNITED STATES OF AMERICA,
Petitioner,

v.

ZAC A. CRITTENDEN, JR.
d/b/a CRITTENDEN TRACTOR COMPANY

On Writ of Certiorari to the United States Court of Appeals for the Fifth District

BRIEF

For National Farm & Power Equipment Dealer's Association as *Amicus Curiae*

JAMES D. KEAST
JOSEPH S. von KAENEL
WILLIAM J. TRAVIS
ARMSTRONG, TEASDALE, KRAMER & VAUGHAN
611 Olive Street
St. Louis, Missouri 63101
Counsel for National Farm & Power Equipment Dealers' Association

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Interest of the *Amicus Curiae*	1
Argument	3
I. Traditional Commercial Practice and Fairness Require That the "First in Time Rule" Be Rejected	3
II. Adopting the "First in Time Rule" Is Commercially Impractical and Would Impose Unnecessary Hardships on Farmers and Equipment Dealers	7
III. The First in Time and Choateness Rules Are Not the Will of Congress, and, Until Congress Acts, the Fifth Circuit's Rule, Based Upon the Model U.C.C., Provides a Greater Degree of National Uniformity and Consistency With Public Policy	8
IV. Alternatively, This Court Should Utilize a Federal Rule Incorporating State Law to Determine Lien Priorities Because the FmHA Already Operates as a Commercial Lender at the State and County Levels and Is Governed by State Law in Many of Its Activities	13
Conclusion	17

Citations

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Citizens Co-op Gin v. United States, 427 F.2d 692 (5th Cir. 1970)	4
Connecticut Mutual Life Insurance Co. v. Carter, 446 F.2d 136 (5th Cir.), cert. denied, 404 U.S. 857 (1971)	10

International Union v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) 16, 17

State Securities Co. v. Aviation Enterprises, Inc., 355 F.2d 229 (10th Cir. 1966) 9

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Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir.), cert. denied, 400 U.S. 852 (1970) 17

Statutes and Regulations:

Consolidated Farmers Home Administration Act of 1961, 7 U.S.C. 1921 et seq. 17

Consolidated Farm and Rural Development Act:

7 U.S.C. 1921 9

7 U.S.C. 1932 2

Federal Tax Lien Act of 1966:

26 U.S.C. 6323 ..... 4, 9

26 U.S.C. 6323 (b)(5) 4, 10

Labor Management Relations Act of 1947, 29 U.S.C. 185 16

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15 U.S.C. 78j 17

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9-302(1)(c) 11

9-310 ..... 4, 10

9-312(4) 11

7 CFR 1800.3 14

7 CFR 1800.4 14

7 CFR 1921.105 14

7 CFR 1921.105(a) 14

7 CFR 1921.105(d)(2)(ii)(B) 14

7 CFR 1921.105(g) 14

7 CFR 1921.106 ..... 7, 11, 12

7 CFR 1921.106(c) 14

7 CFR 1921.107(a)(4) 15

7 CFR 1921.107(b)(2) 15

7 CFR 1921.108 15

7 CFR 1921.111(b) 11, 12

7 CFR 1921.111(c) 15

7 CFR 1930.27(d) 15

7 CFR 1930.44 15

7 CFR 1930.44(a)(3) 6

7 CFR 1930.44(b)(2) 6

7 CFR 1930.46(d)(1) 15

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Agricultural Outlook (U.S. Dept. of Agriculture August 1978) 5

1977-78 United States Manual 14

White & Summers, *Uniform Commercial Code* (1972) ..9, 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1644

UNITED STATES OF AMERICA,
Petitioner,

v.

ZAC A. CRITTENDEN, JR.
d/b/a CRITTENDEN TRACTOR COMPANY

On Writ of Certiorari to the United States Court of Appeals for the Fifth District

BRIEF

For National Farm & Power Equipment Dealer's Association as *Amicus Curiae*

INTEREST OF THE *AMICUS CURIAE*

The National Farm & Power Equipment Dealers' Association (the "Association"), *amicus curiae* in this case,[1] is a Mis-

[1] This brief is filed pursuant to written consent of both parties to the case, in accordance with Rule 42 of the Court.

souri nonprofit corporation consisting of 31 affiliated state and regional associations of retail farm, industrial and power equipment dealers. The 31 affiliated associations represent 10,325 dealers in the 48 contiguous states. The Association is a national trade and service organization for the affiliated associations and their dealer members charged with advancing the general welfare of dealers and having a duty to ". . . aid and protect its members collectively in any and all of their proper business relations."[2]

The Association's member dealers are the principal means of selling and servicing farm equipment throughout the United States. In connection with such sales, the dealers also frequently provide or arrange financing for purchasers. Consequently, the Association's member dealers have frequent business dealings with farmers and ranchers who have Farmers Home Administration ("FmHA") loans. The interests of the Association's member dealers would be significantly and adversely affected if this Court reverses the Fifth Circuit and holds that a security interest of the FmHA is superior to the mechanic's lien of a farm equipment dealer. Because the FmHA is also authorized to make and insure business loans in rural communities,[3] the impact of this case is not limited to the agricultural sector. Thus, the Association's industrial equipment dealers are also vitally concerned about the outcome of this case insofar as it affects the relative priority of liens where the FmHA has made or guaranteed business and industrial loans.

If this Court were to reverse the Fifth Circuit and hold that a security interest of the FmHA is superior in all instances to the mechanic's lien of a dealer for repairs to equipment, traditional commercial practices would be disrupted, and dealers and

[2] Excerpt from the Association's By-Laws.

[3] Consolidated Farm and Rural Development Act, § 310B (7 U.S.C. 1932).

their customers throughout the country would suffer the consequences. Dealers would have to consider whether customers requesting equipment repairs were borrowers from the FmHA, and, if they were, whether payment in advance or other security devices should be required before repair work could be commenced. All of this would result in delaying needed equipment repairs and would probably increase the cost of doing business. Moreover, such delays would be especially severe in agricultural operations because broken equipment must be repaired as soon as possible to meet planting, cultivation and harvesting requirements.

ARGUMENT

I. Traditional Commercial Practice and Fairness Require That the "First In Time Rule" Be Rejected

The government's attempted assertion of the first in time rule goes completely contrary to the special status afforded repairmen and materials suppliers under the lien laws in force in one form or another in virtually every state. The purpose of such laws is stated in the official comments to the Uniform Commercial Code:

> . . . to provide that liens securing claims arising from work intended to enhance or preserve the value of the collateral take priority over an earlier security interest even though perfected.

U.C.C., §9-310, Comment 1.

This special status of the repairmen's lien has been recognized in the Tax Lien Act, 26 U.S.C. 6323, and the court of appeals correctly concluded that that statute established rules to be followed in non-tax cases. In construing §6323(b)(5) of the Tax Lien Act in *Citizens Co-op Gin v. United States*, 427 F.2d 692 (5th Cir. 1970), the Fifth Circuit stated the policy behind favoring the repairman in this manner:

> The statute was designed to protect the small businessman who operates informally, depending upon an oral agreement and his possession to enforce his claim for a reasonable fee for services which rendered the property more valuable . . . The person involved, because of the informality of the transaction and well established custom, is unlikely to check the tax notices or obtain a written security agreement, but he does by custom retain control of the property until he is paid. When such a transaction —whether it be the repair of an automobile or the harvesting and ginning of cotton—increases the value of the property, we think Congress intended that the workers' security be protected against the federal tax lien. To hold otherwise would create injustice and hardship, a result contrary to the remedial purposes of the statute.

Id. at 698.

The collection of taxes is certainly more vital to the government's existence than the making of farm loans through the FmHA. Accordingly, if, as Congress has determined, a repairman's lien takes priority over a federal tax lien, *a fortiori* a repairman's lien should take priority over a lien of FmHA.

There simply is no justification for the government to enjoy any special status when it enters the commercial lending field.[4] Simply stated, the government's position is that its interest in collateral securing its loans is automatically superior to the in-

---

[4] The government suggests in its brief (p. 10) that it is not just another commercial lender. However, as shown by the table set forth below taken from *Agricultural Outlook*, p. 17 (U.S. Dept. of Agriculture August 1978), in March 1978 FmHA as a leader accounted for $4.2 billion of the $43.1 billion of all nonreal estate farm loans outstanding. A lender of such magnitude cannot be insulated from traditional commercial practices without severe economic consequences.

NONREAL ESTATE FARM LOANS OUTSTANDING

	Jan-Mar 1977	Jan-Mar 1978
	Bil. Dol.	
Banks		
Beginning	$23.3	$25.7
Ending	23.7	25.5
Percent change	2%	1%
Production Credit Associations		
Beginning	12.2	13.5
Ending	12.6	13.4
Percent change	3%	0

[Footnote Continued on Next Page]

terest of all third parties merely because it is the government. Such an argument cannot stand.

Ironically, we note that in advocating a blanket, dragnet lien based on the first in time rule, the government, in an apparent case of excessive zeal, goes beyond what is contemplated in FmHA's regulations with respect to mechanic's liens.[5] FmHA's own regulations contemplate the existence of other liens, including mechanic's liens, which may under various state laws, conflict with the FmHA's lien in priority. 7 C.F.R. 1930.44(a)(3) states:

> (3) *Chattel mortgages and other liens of private parties.* A State supplement, if considered necessary by the State Director and OGC [Office of General Counsel], will list priorities of chattel mortgages, landlord's liens, mechanics and materialmen liens, and other liens of private parties.

7 C.F.R. 1930.44(b)(2) speaks of "liens which are prior to FmHA liens."

Moreover, upholding the government's contention that FmHA has a lien superior to all others would raise serious ques-

Farmers Home Administration		
Beginning	1.9	3.1
Ending	2.2	4.2
Percent change	16%	35%
Total		
Beginning	37.3	[1]42.3
Ending	38.4	43.1
Percent change	3%	2%

[1] Total nonreal estate farm loans on January 1, 1978 are estimated at $55.5 billion including—in addition to the above—loans of individuals and others ($8.3 billion), Commodity Credit Corporation loans ($4.5 billion), and a miscellaneous group ($0.4 billion).

[5] See Point IV, *infra*, for further discussion of the inconsistencies between the government's argument and FmHA's regulations.

tions about the validity of purchase money security interests through which large amounts of farm equipment are financed. FmHA's regulations now specifically state that purchase money security interests, if properly perfected, take priority over other liens. 7 C.F.R. 1921.106. If the first in time rule were to be adopted, the priority of purchase money security interests would be drawn into question, and the financing of farm equipment would become much more difficult—all to the great detriment of both farmers and equipment dealers.

The rule stated by the Fifth Circuit is in accordance with traditional commercial practice and adequately protects the interests of the government. The government's argument for the first in time rule is not only unfair to third parties with a claim to collateral, it would give FmHA greater protection than contemplated by FmHA in its own regulations regarding priority of liens.

II. Adopting the "First In Time Rule" Is Commercially Impractical and Would Impose Unnecessary Hardships on Farmers and Equipment Dealers

The government contends that adopting the first in time rule in the context of this case would still permit a repairman to protect himself. In its brief (p. 10), the government suggests that a repairman could protect himself by conducting a lien search to determine the existence of other lien holders, request payment in advance, demand other security, and request a waiver of the FmHA's prior lien.

Such suggestions ignore the realities of the business world. If a farmer's piece of equipment breaks down during harvest, he needs it repaired as rapidly as possible. Only after the work is completed would the repairman discover the farmer is unable to pay and assert the lien. Repairmen are simply not in the business of lending money and cannot be expected to follow the

same procedures as commercial lenders. A repairman cannot reasonably be expected to perform a lien search before commencing repair work. Because the cost of repairs is normally not known until after the work is completed, requiring payment in advance is also impractical. Requiring additional security is no solution because the farmer's other property is probably already subject to prior liens. Requesting a waiver of the FmHA's prior lien is likely to involve inordinate delays, and obtaining such waivers is by no means certain.

When it is considered that most repair bills are insignificant when compared to the amounts loaned by FmHA,[6] the procedures which the government suggests repairmen follow appear all the more absurd. Imposing the first in time rule, as urged by the government, will only make it more difficult for farmers with FmHA loans to obtain equipment repairs. Indeed, the result could be discrimination by repairmen against farmers with FmHA loans. In addition, delays resulting from having to make arrangements to finance equipment repairs at crucial times such as planting and harvesting could cause a farmer to suffer reduced yields or loss of his crop.

If the purpose of the FmHA is to aid farmers, this purpose will be substantially subverted by adoption of the government's first in time rule.

III. The First in Time and Choateness Rules Are Not the Will of Congress, and, Until Congress Acts, the Fifth Circuit's Rule, Based Upon the Model U.C.C., Provides a Greater Degree of National Uniformity and Consistency With Public Policy.

This Court must, for the first time, decide whether, and to what extent, a possessory repairman's lien has priority over an

[6] The amount of the repair bill at stake in this case was $543.81, and the principal amount of the outstanding FmHA loan was $23,500.

earlier perfected federal security interest. The federal statute governing the subject loan is the Consolidated Farm and Rural Development Act, Sec. 301 *et seq.*, 7 U.S.C. 1921 *et seq.*, but the statute is silent as to the priority issue presented in this case. Thus the first in time rule advanced by the government has no statutory basis and is merely one of several alternatives considered by the Fifth Circuit.

In formulating a rule based upon Article Nine of the Uniform Commercial Code, the Fifth Circuit has chosen the alternative which best effectuates the will of Congress, as evidenced by the Tax Lien Act, 26 U.S.C. 6323, and the policy of the vast majority of states which have enacted the U.C.C. The Fifth Circuit has properly rejected the judge made rule of first in time. The choice between the archaic first in time rule and the U.C.C. rule is articulated in White & Summers, *Uniform Commercial Code* §22-11 (1972), as follows:

> The U.S. Congress has enacted a variety of statutes in the security field, but except for federal tax lien statutes nearly all of them are skeletal in nature, and typically leave open such matters as requirements for creation of the interest, priorities, and default rights. If the federal statute is silent, what law should a court use to fill the gap? A court must choose either (1) to accept the invitation of the Code drafters in 9-104(a) to flesh out a federal statutory skeleton with Article Nine law, or (2) to flesh it out with common law entirely of the court's own making. So far, most courts are taking the first course either on the theory that Congress had no power to or did not intend to pre-empt the entire field, or on the theory that while the presence of the statute evinces an intent to pre-empt the entire field, the courts may properly look to Article Nine "by analogy" for the relevant governing rule. (Footnotes omitted.)

See generally *State Securities Co. v. Aviation Enterprises, Inc.*, 355 F.2d 225, 229 (10th Cir. 1966); *United States v. Sommer-*

ville, 211 F.Supp. 843, 846-847 (W.D. Pa. 1962), *aff'd on other grounds*, 324 F.2d 712 (3rd Cir. 1963).

The first in time rule which the government would have this Court adopt is directly contrary to Model U.C.C. §9-310, which gives the possessory lien of a repairman priority over an earlier security interest if the repairman's lien is recognized by statute or rule of law. Such a refusal to apply the U.C.C. by analogy has been criticized:

> But a few courts, state as well as federal, have indicated a disposition to make up some federal common law of their own on the theory that federal law "preempts the field." Of course, even if federal law pre-empts the field, a court could still resort to Article Nine by analogy. *The contrary assumption is simply fallacious.*

White & Summers, *Uniform Commercial Code* §22-11 (1972). (Footnote omitted) (emphasis added).

The better approach, in the absence of the direct mandate of Congress under the Consolidated Farm and Rural Development Act, is to fashion a rule based upon Article Nine to the greatest extent possible.

Not only does the first in time rule ignore the U.C.C., it also disregards the nearest expression of Congressional intent in the area of relative lien priority. As the Fifth Circuit correctly points out, Crittenden's lien would have priority over an earlier federal tax lien under the Tax Lien Act, 26 U.S.C. 6323(b)(5), which abrogates the choateness and first in time doctrines with respect to federal taxes. The Tax Lien Act had already been applied by analogy to FmHA loans in *Connecticut Mutual Life Insurance Co. v. Carter*, 446 F.2d 136 (5th Cir.), *cert. denied*, 404 U.S. 857 (1971). The policy reasons stated by the Fifth Circuit in *Connecticut Mutual* are compelling:

> The collection of taxes is certainly more vital to the government's existence than the making of farm loans and if Congress determines (as it has) that a federal tax lien, involuntarily imposed upon the government, is not unduly threatened by an inchoate lien for attorneys' fees, then we see no reason to exempt a federal mortgage lien, which the government sought to obtain, from the operation of a provision for attorneys' fees in a first mortgage.

Id. at 139.

While the government's sole argument in this case is based upon the sanctity of the choateness and first in time doctrines and the alleged need for their universal application, the FmHA's own regulations deviate from these venerable doctrines in connection with purchase money security interests:

> A purchase money security interest in security property will take priority over an earlier perfected security interest. . . .

7 C.F.R. 1921.106.

> . . . FmHA after-acquired security interests take priority over other security interests perfected after the FmHA financing statement was filed, except as stated in §1921. 106.

7 C.F.R 1921.111(b). These regulations clearly reflect U.C.C. §§9-312(4) and 9-302(1)(c).

Thus, under FmHA's own regulations, if Crittenden had sold equipment to Bridges and had perfected his security interest under state law, Crittenden would have had priority over an earlier perfected FmHA loan. Yet the government argues in this case that Crittenden's possessory repairmen's lien, perfected under state law, is inferior to the FmHA loan on account of the choateness and first in time doctrines. Thus it is apparent the Department of Justice and FmHA positions are

inconsistent, as the regulations recognize the demise of the inchoateness and first in time doctrines. Because the government regulations are based upon the Model U.C.C., the only *uniform* approach is to determine relative lien priority in accordance with the Model U.C.C.

In its brief in *Kimbell Foods*, at pages 21-25 and 41-44 (adopted by reference at page 18 of the government's brief in this case), the government insists it should not be treated as any other commercial lender. However, the government ignores the fact its own regulations place it in the same position as other commercial lenders, at least with respect to purchase money security interests. 7 C.F.R. 1921.106 and 1921.111 (b). The government also seems to forget that the principle of *uniformity* requires it be treated in the same manner as commercial lenders.

The government at page 10 of its brief criticizes the model U.C.C. rule as inequitable because possessory repairmen's liens would have priority over FmHA loans, whereas unsecured creditors, such as grocers, would continue to be behind FmHA loans. The substance of this incredible contention is that the only equitable solution is to make all liens, whether secured or unsecured, perfected or unperfected, inferior to government liens in all cases.

Until such time as Congress establishes definite priorities with respect to FmHA loans, the Model U.C.C. approach, adopted by the Fifth Circuit, best effectuates public policy and national uniformity. The archaic doctrines of choateness and first in time are no longer consistently followed by the government, nor should they be.

IV. Alternatively, This Court Should Utilize a Federal Rule Incorporating State Law to Determine Lien Priorities Because the FmHA Already Operates as a Commercial Lender at the State and County Levels and Is Governed by State Law in Many of Its Activities.

If this Court should choose not to follow the Fifth Circuit's rule based on UCC principles to determine this controversy, it should nevertheless adopt a rule incorporating state law rather than the judge made first in time rule. The government would not be prejudiced by such a resolution because the FmHA is already governed by state law in many areas. This solution calls for a federal common law rule which would adopt or incorporate by reference the applicable state law. The Fifth Circuit stated:

> . . . a decision by this court to incorporate state law would not mean that federal courts must blindly follow a state law which was designed to prejudice federal interests or which produced results consistently antagonistic to those interests. Federal jurisdiction and the fact that state law would apply only by virtue of incorporation into federal law would prevent such a result.

(Pet. App. 27a, n. 18). Thus the federal courts would be able to screen out any unreasonable state legislation.

The financing statement filed by the FmHA in this case utilizes a standard FmHA form. The form lists the owner of real estate in which a security interest is given, and a footnote specifies that "owner" means "Record owner *if required by State law*, otherwise reputed owner." (A. 11-12) (emphasis added). If the FmHA is already governed by state law in determining the identity of the record owner of the property, then it would be inconsistent to exempt the FmHA lien from state law with respect to its priority.

FmHA loans are administered by State Offices, with State Advisory Committees which "serve in an advisory capacity to

the State Directors on all phases of the Farmer's Home Administration." 7 CFR 1800.3. The state organizations are further broken down into 1750 County Offices which determine eligibility for and the amounts of loans. *1977/78 United States Government Manual*, p. 111; 7 CFR 1800.4. Thus, the FmHA has a strong presence on the state and local levels as a commercial lender.

The FmHA regulations recognize FmHA's involvement with state law. Examples of such recognition are:

1. Financing statements and security agreements are required in UCC states, while chattel mortgages and crop pledges are required in Louisiana. 7 CFR 1921.105.

2. With respect to security instruments to be executed by partnerships, the FmHA should seek "the advice of the Regional Attorney or Attorney in Charge, as necessary, to close the loan and obtain the desired liens and liability." 7 CFR 1921.105(a).

3. Subsequent loans having crops as security are affected by the state where the collateral is located: "When determined necessary by OGC [Office of General Counsel], a State supplement will be issued to further explain how often a security agreement covering crops will be taken." 7 CFR 1921.105(d) (2) (ii) (B).

4. Where collateral is located in a state other than that of a borrower's residence, the County Office in the other state must be consulted about "the security instruments to be used and the places of filing or recording in the other State." 7 CFR 1921.105(g).

5. With respect to purchase money security interests in inventory, the office of General Counsel may issue state supplements "to further explain the requirements for perfecting" such a security interest. 7 CFR 1921.106(c).

6. The majority age of youths is defined in "state supplements." 7 CFR 1921.107(a)(4).

7. The minimum requirements for lien searches are set by State Directors and may vary from state to state. 7 CFR 1921.107(b)(2).

8. State statutes, as well as certain forms, such as mortgages, which are commonly used in a particular state, are to be taken into consideration in obtaining subordination agreements, et cetera. 7 CFR 1921.108.

9. "State supplements" are to be issued concerning future advance and after-acquired property clauses. "A State supplement will also be issued when considered necessary by OGC *to reflect any State statutory changes in its version of the UCC.*" 7 CFR 1921.111(c). (Emphasis added).

10. State law determines whether the FmHA must record or file satisfactions of chattel mortgages. 7 CFR 1930.27(d).

11. With respect to the distribution of liquidation sale proceeds, priorities of chattel mortgages, other liens of private parties (including mechanics liens) and UCC liens are determined according to state law. 7 CFR 1930.44.

12. The status of many noncontractual liens as secured or unsecured is determined by state law in connection with the priority of secured claims against the estate of a deceased borrower. 7 CFR 1930.46(d)(1) and (3).

13. State homestead and other exemptions are taken into consideration with respect to FmHA security involved in a bankruptcy. 7 CFR 1930.47(b)(3).

Thus, as a practical matter, the FmHA is already heavily involved in state law. Because FmHA is already subject to state law

in perfecting and enforcing security interests by virtue of its own regulations, the government argument for a standardized federal law is in clear conflict with FmHA's published regulations. Just as the FmHA regulations incorporate state law by reference, so also should the federal rule governing lien priorities.

In many instances where federal statutes are silent as to a given point, the courts have turned to the appropriate state law to supply the missing details. In *International Union v. Hoosier Cardinal Corp.*, 383 US 696 (1966), this Court considered § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185, which was silent as to the applicable statute of limitations. The labor union argued that the state statute could not apply because the dispute was governed by federal law, and urged the Court "to devise a uniform time limitation to close the statutory gap left by Congress." *Id.* at 701. Rejecting this plea for uniformity, this Court stated:

> The need for uniformity, then, is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy. Thus, although a uniform limitations provision for § 301 suits might well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us.

Id. at 702-703. (Footnote omitted). Therefore the Court adopted, as a matter of federal law, the appropriate state statute of limitations.

The controlling purpose of Congress in enacting the Consolidated Farmers Home Administration Act of 1961 is "to provide for more effective credit services to farmers." 7 U.S.C. 1921. The need to decide the relative priority of a repairman's lien and a FmHA loan is unlikely to arise unless the farmer defaults on his government loan, as in the present lawsuit. The federal law is designed to assist the farmer by extending credit to him, and not to give the government an unfair advantage in priority disputes with repairmen after the farmer has gone out of business. As in *International Union, supra*, the lack of uniformity in dealing with the assets of a bankrupt farmer is unlikely to frustrate the federal act in any way.

On the contrary, adoption of the rule advanced by the government, giving the FmHA automatic priority over repairmen, would tend to frustrate the purposes of the act by making it more difficult for farmers to obtain necessary repairs for their farm equipment.

The courts have also adopted state statutes of limitations in connection with § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j, stating that, in the absence of federal law, there should be applied that state law which best effectuates federal policy. See, e.g., *Vanderboom v. Sexton*, 422 F.2d 1233, 1237 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970).

Accordingly, even if this Court does not follow the UCC rule, it should adopt a federal rule incorporating the applicable state law on relative lien priorities. Such a rule is consistent with the Congressional intent expressed in the Consolidated Farmers Home Administration Act and recognizes the FmHA's true position as a large commercial lender at the state and local levels, already heavily involved in state law in many of its activities.

CONCLUSION

The basic issue in this case is whether FmHA should receive favored treatment in the priority of liens when it voluntarily enters the private financial markets as a substantial lender.

The answer should be a resounding no. Basic fairness dictates that FmHA be subject to the same rules as other lienholders under such circumstances. Indeed, FmHA has recognized this in its own regulations which require that it comply with local law in obtaining and enforcing security interests. The government, however, has taken a position inconsistent with FmHA by advancing its choateness and first in time arguments.

To uphold the government's position would have an adverse impact on the advancement of credit to FmHA borrowers by those supplying goods and services to them. This would be clearly contrary to the remedial purposes of FmHA as expressed by Congress.

The Fifth Circuit has fashioned a rule which adequately protects FmHA's interests based on sound commercial practice and the Uniform Commercial Code. The Fifth Circuit decision should be affirmed; or, alternatively, this Court should decree that FmHA be subject to the same local law provisions as a private lender, as, in fact, FmHA's own regulations presently require.

Respectfully submitted,

JAMES D. KEAST
JOSEPH S. von KAENEL
WILLIAM J. TRAVIS
ARMSTRONG, TEASDALE, KRAMER
& VAUGHAN
611 Olive Street
St. Louis, Missouri 63101
Counsel for *Amicus Curiae*, National Farm & Power Equipment Dealers' Association

December 1978

Certificate of Service

The undersigned hereby certifies that the foregoing Brief was served by mailing, air mail, postage prepaid, three copies to each of:

Wade H. McCree, Jr., Esq.
Solicitor General
Department of Justice
Washington, D.C. 20530

Howell Hollis, III, Esq.
Freeman & Hawkins
Fulton Federal Building
Atlanta, Georgia 30303

on this 20th day of December, 1978.

. . . . . .